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Supreme Court, U.S.
FILED

No. 08-189 AUG 12 2008

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

JIM ANTT, JR., *et al.*, Defendants,
Simone Marstiller, Secretary of the Department of Business and Professional Regulation for the State of Florida; JEFF DAVI, Commissioner of Department of Real Estate for the State of California,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a substantial question regarding the standard to apply when assessing personal jurisdiction over a public official in a claim against him in his official capacity, particularly given that the foundation of the minimum contacts test is the personal liberty interest of the due process clause which involves individual, not state, rights.

The questions presented for review are:

1. Whether the courts should apply a tort or "doing business" analysis in determining whether a federal court's exercise of personal jurisdiction is proper when the claim is against a state official acting in his official capacity.

2. Whether a due process analysis is appropriate in a claim against a state official brought under *Ex parte Young* where state jurisdictional criteria are met.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Stroman Realty, Inc. ("Stroman"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 528 F.3d 382. App.1a-9a. The final judgment and opinion of the United States District Court for the Southern District of Texas is unreported. App. 10a-

35a. The district court's opinion finding it had personal jurisdiction over the Commissioner of the Department of Real Estate for the State of California and the Secretary of the Department of Business and Professional Regulation for the State of Florida is reported at 20 F. Supp. 2d 1050. App. 36a-52a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 14, 2008 and amended the opinion on June 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV § 1.

Tex. Civ. Prac. & Rem. Code Ann. § 17.041 provides:

> In this subchapter, "nonresident" includes:
>
> (1) an individual who is not a resident of this state; and
>
> (2) a foreign corporation, joint-stock company, association, or partnership.

Tex. Civ. Prac. & Rem. Code Ann. § 17.042 provides:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the non-resident:
>
> . . .
>
> (2) commits a tort in whole or in part in this state;
>
> . . . .

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

1.a. Petitioner Stroman has specialized in the sale of timeshare interests on behalf of individual owners since 1979. App. 12a. A timeshare is an interest in land and is also referred to as vacation ownership. *See* App. 10a. Stroman's only office is located near Houston, Texas. App. 12a. Stroman is a Texas licensed real estate broker employing Texas licensed real estate agents. Stroman's agents perform services only at the Texas office and do not travel to other states to engage in brokerage activity. *See* App. 12a, 54a.

Stroman spends millions of dollars each year in its promotional efforts. App. 13a. Stroman does not use cold calls or pressure sales. App. 2a. Instead, it uses direct mail, the internet, and national and local newspapers to reach potential customers. *Id.* Stroman maintains over 160 toll free numbers to enable interested buyers and sellers to contact it in Texas. App. 13a. Stroman has brokered sales with buyers and sellers from all fifty states and eighty-six countries. App. 12a. Stroman has brokered the sale of properties located at 1,250 different resorts in forty-seven states and twenty-nine countries. *Id.*

To finance its nationwide advertising and promotional efforts, Stroman charges a fee to register timeshare properties for sale in its database. App. 13a. Stroman advertises timeshares both generically as well as listing individual timeshares on Stroman's website. *Id.* Upon the sale of a timeshare, Stroman also charges a commission of ten percent or $750.00, whichever is larger. App. 2a. Stroman advertises on behalf of Texas residents who own California and Florida-based timeshares. App. 54a.

1.b. In 1990, respondent, the Commissioner for the Department of Real Estate for California ("DRE"), issued an Order to Desist and Refrain against Stroman because it was not licensed as a California broker, for soliciting California residents, and for Stroman's failure to submit its advertising materials for approval to the California Real Estate Commissioner. App. 63a-65a. DRE served Stroman with this order by mail in Texas. App. 4a. DRE issued another Order to Desist and Refrain against Stroman in 1997. App. 60a-62a. It again charged Stroman with acting without a California broker's license, for soliciting California residents, for advertising in the

San Francisco Chronicle, and for failing to submit its promotional materials to DRE for approval. *Id.*

On the same day it issued the desist and refrain order, DRE sent the order to the Texas Real Estate Commission advising it of the order and asserting that it was "the latest in a number of Orders issued against Stroman. . . ." App. 66a. The DRE further advised that it intended to "notify the ERA franchise headquarters and the postal authorities" and was "also exploring possible injunctive action" against Stroman. *Id.* In response to DRE's notice and order, the Texas Commissioner undertook an investigation into Stroman's activities and reported back to DRE. App. 69a-70a.

In addition to the orders and communications with the Texas Real Estate Commission, DRE sent a letter to Stroman's counsel in Texas advising it that Stroman's interstate activity was not exempt from California's licensing and regulatory requirements. App. 55a-59a. DRE further asserted that it was entitled to regulate Stroman's conduct even when no California resident was involved in the transaction if the timeshare was located in California. App. 42a.

On its website DRE advises brokers that advertising on the internet requires a California real estate license:

> Because the Internet can be read by anyone in any location, advertising your services on the Internet would be considered soliciting a California resident when read by a resident of this state.

App. 84a.

1.c. In 1996, respondent, the Florida Department of Business and Professional Regulation ("DBPR"), contacted Stroman in Texas following DBPR's review of one of Stroman's advertising brochures. App. 71a-74a. DBPR advised Stroman that its collection of a fee to register a Florida timeshare interest in Stroman's computer database constituted a violation of Florida law. App. 71a-72a. DBPR also stated that Stroman was obligated to use a resale purchase agreement with specific terms mandated by Florida law including specific language pertaining to recision periods. App. 72a-74a. DBPR further demanded that Stroman produce documents in Florida. App. 74a.

In March 1997, DBPR again wrote Stroman in Texas reiterating its demand that Stroman produce its agreements related to Florida timeshares. App. 81a-82a. DBPR claimed a right to dictate Stroman's business operations. App. 82a. (asserting there was no business impediment to Stroman to including Florida's statutorily mandated language in Stroman's contracts and deferring payment for Stroman's advertising services until after transfer of property).

In May 1997, DBPR requested documents from the Texas Attorney General's office relating to Stroman. App. 67a. The Texas Attorney General answered the request and provided documents in response to DBPR's demand. App. 68a.

Thereafter, in November 1997, DBPR again contacted Stroman demanding that it pay a fine for violation of Florida law for collection of fees from anyone owning a Florida-based timeshare "regardless of the state of residence of the seller." App. 76a. DBPR further required that Stroman obtain a Florida license and that all individuals who "communicate

with the sellers and buyers must be licensed as brokers or salespersons" by Florida when the timeshare is located in Florida "regardless of where the sellers and buyers are located." App. 78a-79a.

2.a. Petitioner sued the respondents pursuant to 42 U.S.C. § 1983 for violation of the dormant commerce clause, U.S. Const. art. I, § 8, cl. 3. Petitioner sought to enjoin respondents' unconstitutional application of California and Florida real estate and timeshare laws and regulations on Stroman's interstate timeshare resale business.

At the outset of the case, respondents moved to dismiss the complaint on numerous grounds, including lack of personal jurisdiction. The district court held that it had personal jurisdiction over the defendants and rejected the respondents' argument that their enforcement of their statutes occurred in their states. App. 39a. The court observed that the states were part of the national government and that the states sought to "regulate the business of a South-Texas land dealer and his numerous South-Texas customers." App. 40a. The court noted that respondents asserted nationwide authority to regulate business and were "applying their authority against a Texan in Texas." *Id.* In addition, the actions of the respondents, sending orders to Stroman in Texas and using Texas government agencies to further their regulatory goals, subjected the defendants to specific jurisdiction. App. 40a-41a.[1] In exercising jurisdiction, the court found it compelling that both states

[1] The court also found respondents subject to general jurisdiction because different agencies of both Florida and California had state offices in the Southern District of Texas and the officers are part of a larger administrative apparatus which has a permanent presence in Texas. App. 41a.

sought to "enforce their statutes in situations that involve only non-residents as long as the land is in the state." App. 42a.

2.b. Thereafter, Stroman moved for summary judgment on its claim that respondents' application of their laws on Stroman's timeshare resale business violated the dormant commerce clause. The district court found that the business of timeshare resales and Stroman's business in particular, constituted interstate commerce. App. 19a. The court considered the laws and regulations of the respondents and the impact of those regulations on the interstate business of timeshare resales. App. 13a-21a.

The court found that the effects of the respondents' regulations on the market substantially impeded the flow of goods and services among the states. "By the states' positions, a man in Sutter Creek cannot use a broker in Dallas to sell a share in Telluride to a woman in Saint Augustine without the brokers complying with the regulations of California, Texas, and Florida." App. 21a. The court ruled that respondents' application of their laws and regulations on out-of-state "timeshare resellers like Stroman Realty, Inc., unconstitutionally obstructs commerce among the states, [and] irreparably injur[es] Stroman." App. 34a-35a. The court enjoined the respondents from enforcing their real estate and timeshare laws against Stroman. *Id.*

3. Respondents appealed. Fifteen states and commonwealths joined the appeal as amici urging reversal of the district court's judgment. The Fifth Circuit did not reach the merits but reversed on the grounds that the district court had neither general nor specific personal jurisdiction over respondents. The court rejected the district court's finding of jurisdiction over

the California and Florida officials because "they are all members of the federal Union" finding it to be without precedent. App. 6a. It likewise found the presence of other state agency offices within the district irrelevant to the personal jurisdiction analysis. App. 5a-6a.

Applying a "doing business" standard, the court found specific jurisdiction lacking relying largely on its earlier decision in *Stroman Realty, Inc. v. Sam Wercinski*, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, 76 U.S.L.W. 3611 (U.S. May 5, 2008) (No. 07-1387). App.7a-9a. The court found the contacts insufficient because although DRE sent its order to the Texas Real Estate Commission, "[i]t did not request any action on the part of the [Texas] Commission." App. 8a. Therefore, DRE did not "avail itself of any of Texas's protections." *Id.* Thus, the court reasoned that because the letter did "not evidence any . . . anticipation" of being haled into federal court and did not put DRE "on notice that it might be sued," it was therefore "insufficient to establish personal jurisdiction." *Id.*

The court likewise found that DBPR's correspondence and demands sent to Stroman in Texas did not create a basis for personal jurisdiction. App. 8a. DBPR's request for information from the Texas Attorney General's office pursuant to the Texas freedom of information act was held insufficient as a contact for purposes of jurisdiction because Stroman's claim did not arise out of that specific contact. *Id.* Notably, the court declined to consider the respondents' assertion of regulatory authority over Stroman and the resulting impact on Stroman in Texas as part of the personal jurisdiction analysis. *See* App. 7a-9a.

REASONS FOR GRANTING THE PETITION

The Court has never addressed the question of the standard a federal court should apply when determining whether to exercise jurisdiction over a non-resident public official in a case brought under *Ex parte Young*.[2] *See, e.g., Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-81 (1979) (declining to address the question of personal jurisdiction by a Texas federal court over Idaho state officials in a case alleging violations of the commerce clause and pre-emption).

In this case and in *Wercinski*, 513 F.3d 476, the Fifth Circuit held the district courts lacked personal jurisdiction over non-resident state officials. In so doing, the court declined to apply the personal jurisdiction analysis typically applied in tort cases, including cases brought under 42 U.S.C. § 1983. In considering minimum contacts, the court refused to consider the regulatory efforts by the public officials in the forum state and the impact of those efforts on the plaintiff in the forum state as a basis for the exercise of personal jurisdiction. Instead, the court looked only to the physical manifestations of the officials' exercise of authority and applied a "doing business" analysis. Because it found those manifestations wanting, the court held that personal jurisdiction had not been established. Other jurisdictions, however, have applied the *Calder* effects test[3] to assess jurisdiction over public officials in both official capacity and individual liability cases and found such jurisdiction proper.

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[2] *Ex parte Young*, 209 U.S. 123 (1908).

[3] The effects test refers to the jurisdictional analysis set forth by the Court in *Calder v. Jones*, 465 U.S. 783 (1984). *See* note 5, *infra*.

Whether any due process analysis is appropriate in a case against a public official acting in his official capacity is also unanswered. Because such claims are not claims against individuals but rather a claim against the office, it is questionable whether a due process analysis should apply in the first instance after service of process is achieved on the public official pursuant to state law.

This case thus presents two critically important questions. First, if a public official is to be treated as a person for purposes of personal jurisdiction as well as for purposes of the waiver of immunity under the Eleventh Amendment, should the courts apply a different personal jurisdiction analysis than that applied to other defendants. The question of whether unlawful conduct dictates application of a different test if it is undertaken by a state official as opposed to a private citizen is of fundamental importance. Second, when a state official is stripped of immunity but the action is nonetheless state action for purposes of the Fourteenth Amendment, should a due process analysis apply in the first instance. Due process rights have been characterized by this Court as an individual liberty interest but the Court has not addressed how, if at all, this affects a personal jurisdiction analysis in an action against a public official who is sued for acts undertaken in his official capacity.

I. CERTIORARI IS WARRANTED TO CONSIDER WHETHER A "DOING BUSINESS" ANALYSIS OR A TORT ANALYSIS APPLIES IN DETERMINING WHETHER TO EXERCISE PERSONAL JURISDICTION OVER A PUBLIC OFFICIAL ACTING IN HIS OFFICIAL CAPACITY.

This Court should establish the proper framework for assessing personal jurisdiction in official capacity actions under § 1983. Here, the court determined that there were insufficient minimum contacts to exert jurisdiction over respondent state officials who had sent cease and desist letters to Texas, sent a cease and desist order to the Texas Real Estate Commission, which resulted in an investigation of Stroman in Texas, and who sought information regarding Stroman from the Texas Attorney General. App. 7a. The court ignored that the state agencies engaged in these contacts in an ultra vires effort to impose defendants' complete regulatory schemes—licensing, advance fee, advertising, and escrow requirements—on a Texas broker in Texas. The court likewise failed to consider Stroman's allegations that the agencies sought to control business practices and contractual relations in Texas, including those transactions that did not involve any residents of the respondents' states. Instead, the court relied on its earlier decision in *Wercinski* finding lack of jurisdiction over the Arizona Commissioner of the Department of Real Estate. *Id.* In so doing, the court declined to analyze Stroman's § 1983 official capacity claim as a tort, but asked only whether the officials "purposefully avail[ed]" themselves of the privilege

of conducting business in Texas, a test applicable to contract-based actions.[4] App. 7a-8a.

a. How such claims should be characterized is a question of great importance. The nature of the underlying case determines which due process framework applies. *See Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004) ("'[T]here are different considerations in analyzing jurisdiction over contract claims and over certain tort claims.'") (citation omitted); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (in tort context the court examines whether defendant "'purposefully directed'" its acts at forum state and in contract cases whether defendant "'purposefully availed' itself of the privilege of conducting activities or consummating a transaction in the forum state.") (citations omitted).

In contrast to the Fifth Circuit, other courts have treated § 1983 actions as a tort for personal jurisdiction purposes in both individual and official capacity cases and applied the "effects" test set forth in *Calder* or a similar torts-based analysis to establish whether the defendant purposefully directed his activities at residents of the forum state.[5] In *Ziegler v. Indian*

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[4] The "purposeful availment" prong in tort cases differs from that in many non-tort cases, where as part of a separate test the defendant derives "'the benefits and protections' of the forum's laws" or creates "'continuing obligations' between himself and residents of the forum . . . ." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In the case of Texas, the long-arm statute provides for jurisdiction where the defendant "commits a tort in whole or in part" in the state. Tex. Civ. Prac. & Rem. Code § 17.042. It does not require that the tortfeasor *also* do business in the state. *See id.*

[5] In *Calder*, the Court held that California had personal jurisdiction over a Florida editor that edited an article in Florida because the "focal point both of the story and of the harm

River County, 64 F.3d 470 (9th Cir. 1995), for example, the Ninth Circuit addressed whether the California court had jurisdiction over Florida sheriffs sued in their individual and official capacities who used their authority to obtain a warrant to arrest a California resident for grand theft, even though the check upon which the theft charge was based was good. In applying the jurisdictional analysis, the court likened plaintiff's § 1983 claim to a tort. *Ziegler*, 64 F.3d at 474. The court went on to hold that, although the sheriffs had not physically entered California, in obtaining the arrest warrant, they had "intentionally directed their actions toward California, for the purpose of having [plaintiff] arrested there and extradited." *Id.* at 475. *See also Trujillo v. Williams*, 465 F.3d 1210, 1220 (10th Cir. 2006) (considering *Calder*'s effects test but declining to find jurisdiction over Virginia prison officials in New Mexico sued in their official capacity because all relevant conduct by Virginia defendants occurred in Virginia where prisoner was housed); *Dial Up Services, Inc. v. Oregon,* 2007 WL 4200756, at *4 (D. Az. Nov. 27, 2007) (applying the *Calder* effects test

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suffered" was California. *Calder*, 465 U.S. at 789. The Court rejected the defendants' proffered analysis under which the forseeability that the article would be circulated in California and have an effect there was insufficient to establish jurisdiction. Instead, unlike the untargeted negligence in a products liability case, the Court determined defendants' "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* The defendants in that case wrote and edited "an article that they knew would have a potentially devastating impact upon respondent" and that "the brunt of that injury would be felt by" the respondent in California. *Id.* at 789-90. Thus "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.

and *Ziegler* to declaratory judgment claims against state officials because these "are more akin to tort claims than contract claims.");[6] *James v. York County Police Dep't*, 160 Fed. Appx. 126, 134-35 (3d Cir. 2005) (Pennsylvania district court had jurisdiction over California narcotics officer under effects test based on officer's call to Pennsylvania Attorney General's office, sending a package to that office and testifying against plaintiff at a preliminary hearing because the officer's "allegedly tortious acts were intended to have an impact on [plaintiff] in Pennsylvania.").[7] Even *Wercinski* conceded that "[i]t . . . seems normally accurate to describe as torts, even under the long arm statute, § 1983 suits against public officials for *individual* misconduct." *Wercinski*, 513 F.3d at 483 (emphasis added).[8] Because the official is de-

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[6] The court found jurisdiction lacking because the complaint did "not allege any action by Defendants aimed at the State of Arizona or causing harm in Arizona." *Dial Up Services, Inc.*, 2007 WL 4200756, at *4.

[7] *See also Taylor v. Phelan*, 912 F.2d 429 (10th Cir. 1990) (finding in § 1983 action that Kansas had jurisdiction over a Missouri police officer who gave assurances to Kansas residents they would be safe from harm and over Missouri Police Department where officer informed Kansas criminal suspect warrant had been issued when officer did not have ability to arrest); *Lee v. City of Los Angeles*, 250 F.3d 668, 692-94 (9th Cir. 2001) (holding that New York police officers were subject to California's jurisdiction in § 1983 action arising out of wrongful extradition of California resident); *Overby v. Johnson*, 418 F. Supp. 471, 472 (E.D. Mich. 1976) (Section 1983 claim is a tort within Michigan long-arm statute); *Maney v. Ratcliff*, 399 F. Supp. 760, 766 (E.D. Wis. 1975) (stating that action under § 1983 "should be read against a background of tort law liability.").

[8] In contrast to *Wercinski*, in *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), the court observed that the Idaho official's attempted extraterritorial

prived of immunity in either case, however, there is no reason to apply a different jurisdictional analysis. The Court should answer the question as to which standard applies and provide needed guidance to the courts.

b. Nor is there a justifiable basis for the Fifth Circuit's distinction between private tort defendants and public officials engaging in unconstitutional conduct, albeit based on their regulatory authority. Given that this Court has expressly held that such officials enjoy no immunity from suits for purposes of injunctive relief, there is no basis for such a distinction. *See Ex parte Young*, 209 U.S. at 155-56; *In re Dairy Mart Conv. Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (finding it proper to exercise jurisdiction over Kentucy officials in New York under *Ex parte Young* exception, noting that the state cannot authorize an unconstitutional act). As Justice Stevens has noted, unconstitutional conduct by a state official causes him to become a "tort-feasor". *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (Stevens, J., dissenting). Once stripped of his immunity, there is no reason to apply a more onerous analysis simply because the claim is against a public official.[9]

Courts routinely examine the effects of the conduct alleged and apply *Calder* in cases involving defen-

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regulation "had the direct effect of stopping a substantial commercial venture based in Texas" and was analogous to tort cases for intentional interference with commercial relationships. *Kidwell*, 577 F.2d at 1268.

[9] Indeed, the fact that "an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment", *Pennhurst State Sch. & Hosp.*, 465 U.S. at 105 (citation omitted), indicates no due process analysis is appropriate. *See* part II, *infra*.

dants who are not public officials. *See Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997). Thus, in *Janmark*, the court found jurisdiction in Illinois over a California defendant proper where defendant called plaintiff's customer in New Jersey, causing the customer to cancel an order pending in Illinois. The court observed that "[t]here is no tort without injury . . . and the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Janmark*, 132 F.3d at 1202. Further, Illinois had "extended its long-arm power to the limit allowed by the Constitution" and "[t]here can be no serious doubt after [*Calder*] that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *Id. See also Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006) (finding that in declaratory judgment action, California had personal jurisdiction over French associations that obtained orders in France purporting to govern California-based plaintiff's conduct in California, even though effect sought by the French court would be felt in France); *Dudnikov*, 514 F.3d at 1073 (finding personal jurisdiction over nonresident defendant proper in Colorado where defendant sent letter to eBay in California intended to invoke procedures that would stop plaintiffs' auction).[10]

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[10] There is conflict among the circuits regarding how to apply the *Calder* effects analysis. The First, Sixth, Ninth and Tenth Circuits utilize *Calder* to determine whether the defendant has met the "purposeful availment" prong of the three-part test, making separate inquiry as to whether the plaintiff's cause of action arose from defendant's contacts with the forum state and the reasonableness of exercising jurisdiction. *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 (1st Cir. 2001) (stating that

Although this Court has never held that a different standard should apply merely because a state official exerts unconstitutional regulatory authority versus committing some other variety of tort, some courts turn a blind eye to the allegations of tortious conduct in official capacity actions and apply a heightened standard, either by segregating the contacts with the forum from the effects of the unconstitutional conduct, or by imposing additional criteria that effectively preclude a finding of personal jurisdiction over the officials. In *Wercinski*, for example, the Fifth Circuit applied an economic benefit criterion to find that the Arizona real estate commissioner was not subject to an official capacity suit in Texas, stating:

> the Commissioner was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law. Because no such benefit accrues to the Commissioner from her activities relating to

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"*Calder* addressed purposeful availment, rather than relatedness."); *Air Products and Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 552-55 (6th Cir. 2007); *Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007); *Dudnikov*, 514 F.3d at 1071-78 (applying *Calder* as part of purposeful availment prong). The Second and Third Circuits, however, treat *Calder* as a test separate from the three-part inquiry that can independently establish jurisdiction. *Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) (observing that if a plaintiff satisfies *Calder*'s effects test, "the plaintiff can demonstrate a court's jurisdiction over a defendant even when the defendant's 'contacts with the forum alone . . . are far too small to comport with the requirements of due process' under our traditional analysis.") (citation omitted); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 243 (2d Cir. 2007) (suggesting that *Calder* provides the means for demonstrating minimum contacts). This case presents the opportunity to resolve this disagreement.

> Texas, any jurisdiction based upon her having caused an "effect" in Texas is likewise misplaced.

Wercinski, 513 F.3d at 485.[11] The court here engaged in similar reasoning when it examined whether the respondents had "purposefully availed" themselves "of the privileges of conducting business in Texas" and examined the contacts without regard for the effect of the officials' attempted regulatory activity in Texas. App. 7a-8a. *See also Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir. 1992)[12] (finding that Michigan did not have jurisdiction over state officials from Nevada, Washington and South Carolina who directed conduct to Michigan that denied Michigan waste generators access to disposal facilities in part because "[t]he defendants' states have undertaken no economic activity in the state of Michigan in relation to the disposal sites.").[13]

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[11] The *Wercinski* court stated that, in making this analysis, it was relying on this Court's decision in *Kulko v. Superior Court*, 436 U.S. 84 (1978). *Wercinski*, 513 F.3d at 485. However, the Court in *Kulko* expressly noted that the domestic relations matter at issue in that case was different from commercial and tort-based cases and observed that the dispute involved an agreement negotiated and signed in New York. *Kulko*, 436 U.S. at 96-97. *Kulko* does not apply to cases where a state agency exerts authority unconstitutionally to alter contracts and business practices in the forum state.

[12] In *Griepentrog*, the plaintiff sought declaratory and injunctive relief to enjoin defendants from barring access to waste disposal facilities, alleging the officials had no authority to do so. *Griepentrog*, 954 F.2d at 1176.

[13] Neither the Texas long-arm statute nor Michigan's includes economic benefit as a prerequisite for jurisdiction in tort cases. *See* Tex. Civ. Prac. & Rem. Code § 17.042; Mich Comp. Laws § 600.705(2) (providing for specific jurisdiction based on "[t]he

Both the Fifth and Sixth Circuits, however, reasoned that a different jurisdictional standard should apply if the claim arises out of the enforcement of state or federal law. *See Wercinski*, 513 F.3d at 486 (stating that the Commissioner's intent for her activities "is to uphold and enforce the laws of Arizona."); *Griepentrog*, 954 F.2d at 1178 (stating that "defendants have acted in accord with federal law and these actions do not give rise to personal jurisdiction."); *see also Hannon v. Beard*, 524 F.3d 275, 281 (1st Cir. 2008) (rejecting defendant prison official's *Wercinski*-based argument that personal jurisdiction was lacking because his activities were not "commercial", stating that the action in *Wercinski* "attacked the validity of that law" and therefore *Wercinski* was inapplicable).[14]

There is, however, no basis for requiring greater forum contacts by a state agent in official capacity actions than from other defendants merely because the official purports to enforce his state's regulatory intent. This Court has rejected constitutional distinctions based on whether allegedly tortious official conduct is in furtherance of a sovereign function. Thus, in *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003), the Court declined to require Nevada to apply California's sovereign immunity statute to a Nevada resident's Nevada suit against the California Tax Board despite California's argument that immunity was required to "avoid interference with California's 'sovereign responsibility' of

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doing or causing an act to be done, *or consequences to occur*, in the state resulting in an action for tort.") (emphasis added).

[14] *Hannon's* characterization of Stroman's claim in *Wercinski* is inaccurate. Stroman attacked the application of Arizona real estate laws to Stroman's Texas-based interstate business.

enforcing its income tax laws." *Hyatt*, 538 U.S. at 498 (citation omitted). The Court observed:

> There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in [*Nevada v.*] *Hall*, [440 U.S. 410 (1979)] and California's interests in the tort claims here arising out of its tax collection agency's residency audit. . . . If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereignty function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships.

Id. at 498-99.

Whether the defendant is a state official acting beyond his regulatory power or another tort defendant directing harm to residents of another state is a distinction without a difference; both are unlawful. *See Maney v. Ratcliff*, 399 F. Supp. 760, 767 (E.D. Wis. 1975) (rejecting Louisiana police officers' claim that their Wisconsin contacts "were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit", stating that "nothing in the [Wisconsin] long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient 'minimum contacts' . . . then personal jurisdiction may be exercised over them.").

c. In both this case and in *Wercinski*, the court declined to consider Stroman's allegations against the state officials and the impact of their actions on Stroman's business in Texas. Rather than afford § 1983 defendants in official capacity cases special consideration by virtue of their enforcement activities, courts instead should look to the plaintiff's cause of action and the effect of the regulatory conduct on the plaintiff in the forum state. Here, the court did not factor Stroman's underlying allegations — that respondents were acting unconstitutionally to force Stroman to change its contracts and business practices in Texas — into the jurisdictional analysis.

The nature of Stroman's services underscores the importance of examining the underlying allegations in evaluating personal jurisdiction in cases based on asserted regulatory authority. Stroman's advertising and brokerage contracts are personal service contracts governed by the law of the place of performance, which is entirely in Texas. *See Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 123 (1912) (rejecting claim that Colorado law applied to contract for sale of land drafted in Minnesota because it involved Colorado property because the contract was "strictly personal" and "[i]t in no way affects the land or seeks any remedy against it."); *Coldwell Banker & Co. v. Karlock*, 686 F.2d 596, 599 (7th Cir. 1982) ("A real estate brokerage contract is generally characterized as a contract for personal services rather than a contract conveying an interest in land."); *Richland Dev. Co. v. Staples*, 295 F.2d 122, 128 (5th Cir. 1961) (allowing unlicensed broker's suit, court noted that if an "Alabama citizen goes out of the state and enters into a contract that primarily is to be performed in a foreign state, he should expect to forego certain protections that his own state would afford, just as he

becomes entitled to enjoy the protection of the foreign state."). Thus the respondents' regulation does not take place in California or Florida, but in Texas where these contracts are established and performed.[15]

Instead of considering the nature of Stroman's business and the regulation by respondents, however, the court looked narrowly at the officials' communications and documents sent to the state.[16] Likewise, in

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[15] This case is unlike *U.S. v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995), where the defendant was not setting standards for or directing the behavior of prosecutors in the District of Columbia, but those who were licensed by New Mexico. *Ferrara*, 54 F.3d at 830. Here, the respondents are directing "how [brokerage transactions are] to be conducted" in Texas. *Id.* at 828.

[16] In addition to looking only at discrete contacts rather than Stroman's action as a whole, the court declined to count Florida's attempt to obtain information from the Texas Attorney General's Office regarding Stroman, stating that "[o]nly those contacts out of which the claim arises count in specific jurisdiction analysis" and that "[t]here is no way to construe that contact as a basis for the suit . . . ." App. 8a. However, this Court "has not yet explained the scope of . . . [the arises out of] requirement." *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 and n.4 (3d Cir. 2007) (noting that although the Court granted certiorari on this question in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Court decided the case on other grounds); *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99-100 (3d Cir. 2004) (observing that "the question of what level of relationship is necessary under the 'arise out of or relate to' requirement. . . . has plagued federal Courts of Appeals and has resulted in divergent rules."); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (describing conflicts among the circuits as to the standard to apply in determining whether a contact "relates to" a claim). Here, contrary to the court's conclusion, the attempt to obtain documents from Texas government offices was part of the Florida agency's overall efforts to impose Florida's regulatory scheme on Stroman in Texas, and is thus related to Stroman's

Wercinski, the court also declined to consider the nature of Stroman's allegations, lest the court "confuse[] fairness with the merits of the case." *Wercinski*, 513 F.3d at 489. Consideration of the nature of the allegations, however, is appropriate.[17]

In contrast to the Fifth Circuit, other circuits look to the nature of the claims alleged in addressing motions to dismiss for lack of personal jurisdiction. For example, in *Hannon*, the First Circuit considered the underlying allegations in plaintiff's § 1983 claim and found they were "more analogous to a tort claim than a contract claim . . . ." *Hannon*, 524 F.3d at 283. The court found that personal jurisdiction comported with due process because the claims arose from the official's contact with Massachusetts in that the injury would not have occurred but for the official's transfer arrangements, the transfer to Massachusetts constituted purposeful availment and jurisdiction was

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claim. This Court should clarify the "arises out of or relates to" test and provide needed guidance to the lower courts.

[17] Indeed, the district court here found that the allegations related directly to "fairness":

> On the one hand, [the states] argue that they may regulate Stroman *even though* it is from a different state, *even though* it conducts its business from a different state, and *even though* it has only tenuous connections with their states. On the other hand, they argue that this court does not have jurisdiction over them *because* they are from different states, *because* they conduct their business from different states, and *because* they have only tenuous connections with this state. They cannot have it both ways. . . . It's a two way street. . . . These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice.

App. 43a (citation omitted).

otherwise reasonable. *Id.* at 282-85. *See also Kidwell*, 577 F.2d at 1267 (court determined that Idaho officials' attempt to regulate a Texas company caused plaintiff to undertake reasonably foreseeable "efforts in Texas to comply with the Idaho state law" and that such regulation had "substantial consequences on important business plans" that satisfied the "minimum contacts requirement.").[18] Likewise, in conspiracy cases, courts examine whether the plaintiff has made a prima facie showing of the underlying civil conspiracy to establish jurisdiction. *See, e.g., Second Amendment Found. v. United States Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001) (holding that allegation that mayors discussed legis-

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[18] Reversing *Kidwell* on venue grounds, the Court in *Leroy* found that Great Western's claim arose only in one district and therefore venue was proper only in Idaho. *Leroy*, 443 U.S. at 186. The Court found the basis for Great Western's claim was Idaho's enactment of the statute, Great Western's filing was reviewed in Idaho, the letter was sent from Idaho, the order was entered in Idaho, and that any future action might be taken in Idaho. *Id.* at 185-86. The Court likewise found that Idaho judges were better suited to construe the Idaho law. *Id.* at 186. While the venue analysis is similar to an evaluation of personal jurisdiction, the facts here are considerably different. Here, respondents are not seeking to control the acquisition of a corporation based within their states. They seek to regulate transactions that are personal service contracts performed in a different jurisdiction. Many of the transactions respondents seek to regulate do not even involve residents of the respondent states. In addition, respondents made additional demands on Stroman in Texas and sought information from Texas state regulatory authorities as well as impugned Stroman's reputation with the Texas state agency responsible for regulation of Stroman. Further, Stroman's case does not involve interpretation of state statutes but whether those statutes can constitutionally be enforced against Stroman in its interstate business activities, a question of federal, not state, law.

lative and litigation strategies was insufficient to show conspiracy and therefore court did not have jurisdiction); *see also Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 411 (7th Cir. 1994) (finding Maryland defendant subject to jurisdiction in Indiana in a trademark infringement action, reasoning that "[t]he Indianapolis Colts use the trademarks they seek to defend in this suit mainly in Indiana. If the trademarks are impaired, *as the suit alleges*, the injury will be felt mainly in Indiana.") (emphasis added).

Moreover, there is no basis for the Fifth Circuit's dichotomy between personal jurisdiction and the merits, where the merits of the claim and bases for jurisdiction are intertwined. "[W]here the issue of jurisdiction is dependent upon a decision on the merits. . . . the trial court should determine jurisdiction by proceeding to a decision on the merits" to avoid "making a summary decision on the merits without the ordinary incidents of a trial . . . ." *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965) (dismissal for lack of personal jurisdiction in automobile tort case improper because the appellate court was "unable to say with any degree of legal certainty that the appellants could not make out a valid cause of action against one or more of the appellees."); *see also Sandpiper Village Condo. Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 n.12 (9th Cir. 2005) (declining to address whether sufficient minimum contacts existed to exert jurisdiction over defendant because "[a]lthough personal jurisdiction is ordinarily determined at the outset as a threshold matter, in this case that issue is inexorably intertwined with the merits."); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 849, 852 (11th Cir. 1988) (finding that the

district court "failed to appreciate the significance" of an alleged meeting involving defendant corporate officer in Georgia and that personal jurisdiction over the officer was appropriate because "if, on the merits, [plaintiff] establishes illegal conduct by" the corporation, the officer could be held personally liable).[19]

Refusing to consider the merits where the officials are alleged to have imposed their regulatory authority with the intent to affect contractual relations and alter business practices in the forum state makes even less sense given that private defendants may be subject to jurisdiction when they "deliver[] . . . products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and injury results. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980); *see also Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (applying stream of commerce analysis to exercise jurisdiction in tort and contract case over defendant which con-

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[19] Similarly, the courts readily look to the underlying claim to establish subject matter jurisdiction or determine whether the suit is barred by the Eleventh Amendment. *See, e.g., Land v. Dollar*, 330 U.S. 731, 738 (1947) (allegations that government officials exceeded their authority as alleged in plaintiffs' complaint, if true, would determine jurisdiction, therefore court could proceed to the merits); *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359, 363 (5th Cir. 1967) (reversing dismissal of Sherman Act claim for lack of jurisdiction, noting "[t]he question of jurisdiction here, including the existence of a conspiracy and a boycott or secondary boycott and their significant effect on interstate commerce, is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked jurisdiction" and that "[t]he allegations of the complaint expressly allege a violation of the Sherman Act . . . .").

tracted with third party who brought defective crane to forum state).

The situations here and in *Wercinski* are readily distinguishable from cases where courts have declined to exert jurisdiction over officials who have merely sent state documents into the forum state in the exercise of an administrative function. In *Payne v. County of Kershaw, South Carolina*, 2008 WL 2876592 (N.D. Tex. July 25, 2008), the district court declined to find jurisdiction over South Carolina court clerks who sent earnings withholdings notices to plaintiff's employers in Texas pursuant to support orders entered in South Carolina as part of plaintiff's South Carolina divorce. Although the court called the case "similar to" *Wercinski*, *Payne*, 2008 WL 2876592, at *5, *Wercinski* (and this case) arise from the state officials' attempts to unconstitutionally impose their states' regulatory schemes on the forum jurisdiction and residents within it including Stroman and its Texas clients, affecting contracts and practices in the forum state. In contrast, *Payne* involves mere ministerial acts by the state officials conducted as part of their administrative duties after entry of a court order in their home state. *See also Hannon*, 524 F.3d at 280-83 (finding personal jurisdiction in Massachusetts over Pennsylvania department of corrections head who effected prisoner's transfer, but declining to find jurisdiction over Pennsylvania prison librarian who merely responded to requests plaintiff made from Massachusetts).

II. CERTIORARI IS WARRANTED TO CONSIDER WHETHER A DUE PROCESS TEST IS APPROPRIATE IN AN ACTION AGAINST A STATE OFFICIAL IN A CASE BROUGHT UNDER *EX PARTE YOUNG* WHERE STATE JURISDICTIONAL CRITERIA ARE MET.

In a case involving a claim under *Ex parte Young*, there is a substantial question as to whether a due process analysis is appropriate if the claim is, in reality, one against the state. While the Court has treated such claims as against an individual for purposes of the Eleventh Amendment, it has not held that the official is a person within the meaning of the Fourteenth Amendment. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 105. Thus, in *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court held that "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not* a suit against the official personally, for the real party in interest is the entity." *Graham*, 473 U.S. at 166; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (noting "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."); *McCarthy v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004) ("Only for the purposes of the Eleventh Amendment are 'official-capacity actions for prospective relief . . . not treated as actions against the State.'") (quoting *Graham*, 473 U.S. at 167 n.14) (alteration in original).

Personal jurisdiction, however, is "an individual liberty interest" derived from the due process clause. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites*

de Guinee, 456 U.S. 694, 702 (1982); *see also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (the rights created by the due process clause of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights). Thus, while *Young* permits a suit against the state in federal court by treating the official as a person for purposes of the Eleventh Amendment, once service has been obtained pursuant to state law,[20] there is no underlying rationale justifying the application of any due process analysis because a state has no due process rights. *See State of South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . .") (citation omitted). *In re Reserves Dev. Corp. v. Browning*, 64 B.R. 694 (W.D. Mo. 1986), *rev'd on other grounds*, 821 F.2d 520 (8th Cir. 1987) (holding that no minimum contacts analysis was required prior to the bankruptcy court's exercise of jurisdiction over state officials of West Virginia because "a state is not a 'person' under the 5th Amendment.") (citing *Katzenbach*, 383 U.S. at 323). In *Browning*, the court noted that "a suit against defendants in their official capacity is a suit against the state, and the Supreme Court has held that a state does not have standing 'as parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen.'"

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[20] In *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987) the Court held that where the federal statute does not provide for service of process, the federal courts must look to the law of the forum state to determine whether personal jurisdiction can be asserted over a defendant. *Omni*, 484 U.S. at 106.

Browning, 64 B.R. at 697(citing *Katzenbach*, 383 U.S. at 324).[21]

That no due process analysis should be required makes even more sense when one considers the ease with which the individual state office holder may be substituted in the litigation, without any consideration as to the individual's actual contacts with the forum. Fed. R. Civ. P. 25(d) provides that where an officer in an official capacity case ceases to hold that office during the pendency of the case, "[t]he officer's successor is *automatically* substituted as a party." (Emphasis added.) The individual officer's role as a mere placeholder in the litigation is more apparent considering failure to name the successor in the suit has no effect on the case. *Id.*; *see also* Wright & Miller, 7C Fed. Prac. & Proc. Civ.3d § 1960 ("If . . . the parties and the court are unaware of the change in the office, they can continue to litigate under the name by which the action was commenced, and the litigation will be entirely valid . . . . When and if a question is raised, the name can be changed, no matter how much time has elapsed."). Because the personal jurisdiction requirement arises from "an *individual*'s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'", *Burger King Corp.*, 471 U.S. at 471-72 (emphasis added) (citation omitted), there is no basis for applying a due process test to the real party in interest when it is a state, nor for bestowing due process rights upon an "office". *But see U.S. v.*

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[21] It is reasonable to infer that the district court was alluding to these principles when it observed that the court and the respondents were part of the same government and jurisdiction was proper based on the respondents' exercise of nationwide regulatory authority. *See* App. 40a.

Ferrara, 54 F.3d 825, 831-32 (D.C. Cir. 1995) (concluding that if the official were treated as a state, the language of the District of Columbia long-arm statute would not permit jurisdiction).

Courts have raised the concern that permitting suits against non-resident officials could subject them to litigation nationwide. *See, e.g., Wercinski*, 513 F.3d at 487. Even if there were no due process limitation on the exercise of personal jurisdiction, however, it would not result in such exposure. Other statutes and doctrines require a connection between the official and the forum. *See Leroy*, 443 U.S. at 185-86; 28 U.S.C. § 1391(b) (limiting litigation to those districts "in which a substantial part of the events or omissions giving rise to the claim occurred . . . ."). Likewise, the doctrine of forum non conveniens permits courts to decline to hear cases that could be better decided elsewhere. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Requiring a personal jurisdiction analysis in a case to limit the districts in which an *Ex parte Young* action can be brought is unnecessary in light of these limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2008

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 05-20803

STROMAN REALTY, INC.,
Plaintiff-Appellee,

v.

JIM ANTT, JR., *et al.*, Defendants, Simone Marstiller, Secretary of the Department of Business and Professional Regulations for the State of Florida; Jeff Davi, Commissioner of Department of Real Estate for the State of California,
Defendants-Appellants.

May 14, 2008
As Amended June 18, 2008

Appeal from the United States District Court for the Southern District of Texas

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Before GARWOOD, SMITH and DeMOSS, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge:*

Stroman Realty, Inc. ("Stroman"), a Texas-based real-estate broker engaged in the resale of time-shares, filed a declaratory judgment action in Texas to enjoin California and Florida officials from imposing their states' respective licensing and regulatory requirements on real estate transactions in their

states or involving their citizens, alleging that application of these requirements violates the dormant Commerce Clause. The district court enjoined Florida and California from enforcing their requirements on Stroman. Because the district court lacked personal jurisdiction over the defendants, we reverse and render a judgment of dismissal.

I.

Although Stroman's only office is in Conroe, Texas, it has sold properties in 47 states and 29 countries and has served purchasers in every state and in 87 countries. It establishes a large database of available timeshares; it does not use cold calls or pressure sales but focuses instead on advertising to customers through direct mail, the Internet, and newspapers. Its website displays its available properties, and its computer system matches potential sellers with buyers. All of its agents and brokers are licensed in Texas.

Stroman generates revenue through advance listing fees and commissions. It charges sellers a one-time $500 non-refundable advance fee to be listed on its website, as well as a commission of 10% or $750, whichever is greater, upon sale. In 1997, the year during which most discovery in this case occurred, Stroman made the vast majority of its revenue through advance fees, and most homes it listed were never sold. The parties argue strenuously about the prevalence of advance fees in the resale industry and about the policy arguments for and against advance fees.

A.

Florida requires all real-estate brokers to be licensed and declares that all contracts with its residents procured by agents who are unlicensed in

Florida are void. Although Florida originally claimed that a real-estate agent would need to be licensed to sell a Florida timeshare regardless of where the owner or seller resides, it now claims that brokers only need to be licensed when they interact with Florida citizens. Florida licenses are available to out-of-state residents, although the residents must complete educational requirements and pay license fees. Renewal of a Florida license requires continuing education and additional fees.

Florida prohibits brokers from collecting advance listing fees for Florida timeshares (although they may collect such fees for traditional real estate). That ban explicitly applies to advance fees charged to non-resident owners of Florida timeshares. Out-of-state brokers must be approved by the Secretary of State and must consent to service of process in Florida.

B.

California also requires that all brokers who serve its residents have California licenses, participate in continuing education, and pay licensing fees. Though California allows advance fees, it requires brokers to keep such fees in a trust account in an in-state bank until they are spent for the customer's benefit. Brokers must account for those funds, and advertising materials soliciting fees must be approved by the state.

California also has a unique regulation: Licensed brokers must maintain an office in California that "shall serve as [their] office for the transaction of business." CAL. BUS. & PROF.CODE §10162 (2007). The parties dispute whether all work must be done from that office, as the district court found. California claims that licenses are still available to non-residents, who need not maintain an in-state office until

after they have acquired a license. California also urges that although the in-state office must be the broker's principal place of business, it need not be the exclusive place of business.

II.

In 1990, California, by mail, ordered Stroman to cease advertising and brokerage activities in California. In 1997, the Commissioner of the California Real Estate Department signed an order citing Stroman for violating California statutes and regulations in 1997. The order was mailed to the Texas Real Estate Commission, which investigated and determined that Stroman had complied with California's orders.

Invoking 42 U.S.C. § 1983, Stroman sued Florida's Secretary of the Department of Business and Professional Regulation, seeking an injunction to prevent Florida officials from enforcing their brokerage laws, after the Secretary had commenced enforcement proceedings in 1998. The California Commissioner was later joined as a defendant.

The defendants unsuccessfully moved to dismiss for want of personal jurisdiction. On cross-motions for summary judgment, the district court granted Stroman an injunction, finding that the real-estate licensing requirements of Florida and California violate the Dormant Commerce Clause when applied to Stroman's timeshare resale business in Texas.

III.

We adopt Texas's jurisdictional statutes to reach out-of-state defendants, because § 1983 lacks a provision for services of process. *See* FED.R.CIV.P. 4(e), (k). The Texas long-arm statute extends to the limits of the Constitution; our inquiry is therefore limited to the reach of the Fourteenth Amendment's Due Pro-

cess Clause. *See Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369, 373 (5th Cir.2003).

The Fourteenth Amendment allows a court to assert personal jurisdiction over defendants who have meaningful "contacts, ties, or relations" with the forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Such contacts can give rise to general or specific jurisdiction. Courts exercise "general jurisdiction" over any action where the defendant has "continuous and systematic general business contacts" with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n. 9, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). If the contacts are less pervasive, courts may exercise "specific jurisdiction" in "a suit arising out of or related to the defendant's contact with the forum." *Id.* at 414 n. 8, 104 S.Ct. 1868.

The district court found general and specific jurisdiction. We review those findings *de novo. Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 342 (5th Cir.2004).[1]

A.

The district court held that it had general jurisdiction because the State of California Franchise Tax Board and the Florida Department of Revenue had offices in Houston, Texas, according to the phone directory. *See* SOUTHWESTERN BELL, GREATER HOUSTON

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[1] Stroman maintains that appellants have waived their objections to personal jurisdiction. This is incorrect. In its opinion denying appellants' motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), the district court explicitly held that appellants were subject to the court's jurisdiction. Because appellants appropriately moved for dismissal for want of personal jurisdiction, they have not waived the issue for purposes of appeal. *See* FED.R.CIV.P. 12(h).

BUSINESS WHITE PAGES 129, 265 (1998). Neither of the two departments that were sued had an office in Texas, however, nor did the district court make findings regarding the officers' particular contacts that could give rise to general jurisdiction.

Instead, the court reasoned that because the officers are parts of larger administrative apparatuses, segments of which had a permanent presence in Texas, this could give rise to general jurisdiction. The court went further by asserting that because "[the court] is part of a government that is clearly and directly related to the two states and their governments," it had jurisdiction over the defendants. In other words, courts in the Southern District of Texas have jurisdiction over California and Florida officials because they are all members of the federal Union.

The district court did not cite any authority for these propositions; there is none. To draw no distinction between officers of a state (or the department of which the officer is a member) and the state itself would allow, as a matter of constitutional due process, an Oklahoma resident to sue a California state trooper in Texas for civil rights violations occurring in California. In other words, the practical consequence of this approach would be that any state action by a Florida or California official could be challenged in Texas. This is not the general jurisdiction contemplated in *Helicopteros*, which arises out of continuous and systematic contacts with a forum. *See Helicopteros*, 466 U.S. at 415-16, 104 S.Ct. 1868. Rather, it is an attempt at universal jurisdiction, by a federal district court, for which there are no limiting principles.[2]

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[2] We take no position on whether, for example, the Florida Department of Revenue is subject to general jurisdiction Texas.

B.

The district court lacks specific jurisdiction in light of *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 483-84 (5th Cir.2008), *petition for cert. filed* (May 5, 2008) (No. 07-1387), in which we held that a district court in Texas did not have personal jurisdiction over Stroman's suit against the Commissioner of the Department of Real Estate for Arizona, because the latter did not have sufficient minimum contacts with the forum. The contacts between the commissioner and Texas were a cease-and-desist order and correspondence with Stroman's attorneys. *Id.* at 484.

Stroman urges that the contacts in this case are more extensive than those in our earlier case.[3] In addition to cease-and-desist letters such as those found in the earlier case, Stroman alleges that California attacked Stroman in letters to the Texas Real Estate Commission, and Florida used the Texas Attorney General's office to get information. Neither of those additional contacts is sufficient to create personal jurisdiction.

Purposeful availment of the privileges of conducting business in a forum is indicative that a defendant has contacts with a state. *See Nuovo Pignone v. Storman Asia ATV*, 310 F.3d 374, 378 (5th Cir.2002). Stroman urges that California purposefully availed

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Nor do we decide the precise scope of whatever general jurisdiction may arise out of one state's having an office in another. We conclude only that fording general jurisdiction under the facts presented here would violate the Due Process Clause of the Fourteenth Amendment.

[3] Despite its claim in that regard, Stroman said this case was virtually identical to the earlier one, and it attempted to consolidate them.

itself of the privileges of conducting business in Texas when it sent its cease-and-desist order to the Texas Real Estate Commission, resulting in the Commissions's investigation of Stroman's compliance with the order.

If Stroman's characterization of the communication were accurate, it would therefore go toward satisfying the "minimum contacts" test. It is incorrect, however, to characterize that contact as purposeful availment. The letter served only to notify the Commission that an order to cease and desist had issued against Stroman. It did not request any action on the part of the Commission. In other words, California did not avail itself of any of Texas's protections.

Ordinarily, minimum contacts are a proxy for determining whether a defendant could reasonably anticipate being haled into federal court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Because the letter does not evidence any such anticipation, nor puts a party on notice that it might be sued, it is insufficient to establish personal jurisdiction.

Stroman also alleges that Florida used the Texas Attorney General's Office to obtain information as a basis for its Florida lawsuit. Florida made a Texas Public Information Act request for public documents, but that is not a sufficient contact. Only those contacts out of which the claim arises count in specific jurisdiction analysis. *See Nuovo Pignone*, 310 F.3d at 378. There is no way to construe that contact as the basis for the suit; Stroman's cause of action does not arise out of that request. More importantly, however, Florida's secretary could not have reasonably expected to be haled into court for requesting public information.

Because the district court did not have personal jurisdiction over this matter, it is inappropriate for us to reach the merits of the case. The judgment is VACATED, and judgment of dismissal for lack of personal jurisdiction is RENDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action H-98-283

STROMAN REALITY, INC.
Plaintiff,

versus

JIM ANNT, JR., *et. al.*,
Defendants.

Opinion on Summary Judgment

1. *Introduction.*

A real-estate brokerage company sued two state officials for interfering with its ability to sell timeshares. They imposed the states' licensing requirements and fee restrictions on it, and it claims that this unconstitutionally interferes with interstate commerce. Both sides have moved for summary judgment. The broker will prevail.

2. *Timeshares.*

A timeshare—also called a vacation ownership—is the right to enjoy a property for a limited period, usually weekly. Some timeshares are owned by individuals; others are owned by resorts. Vacationers may pay a fee to the owner or exchange time at one resort for an interval at another. In 1997, approximately two million people owned timeshares in the United States. They owned 64,000 timeshares located in 1,200 resorts among 45 states. Florida has the

largest number of resorts with 24% of them. California is second with 8%.

Timeshares may be bought from two sources. People may acquire directly from the developers, or they buy them from an earlier owner in the secondary market. An individual who owns a timeshare that he wants to sell faces hurdles. First, reselling individuals must compete with new properties. Second, owners often live far from their vacation sites, making it impractical for them actively to show the unit to potential buyers. Third, the low unit price makes many marketing tactics uneconomical. Finally, resellers lack the economies of scale for promotion that developers may use to reach a wide market.

A timeshare is an interest in land about halfway between a condominium and a hotel room—a variable time, exchangeable location sub-lease. In California, Texas, and Florida, timeshare owners have the same technical estate in property as a hotel guest—a limited privilege to enjoy the land of another person, a license.[1]

Apart from the resorts that have been developed for timeshare use and those resorts that have been re-developed in that form, people who own houses and apartments in attractive places compete with the institutional resorts. They market their properties for temporary use by others through brokers and themselves directly. Management companies offer timeshares in houses owned by individuals as part of a system of alternative properties within which owners may exchange occupancies or members may use par-

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[1] CAL. BUS. & PROF. §§11212 (West 2005); FLA.. STAT. ANN. §§ 721.05 (West. 2005); TEX. PROP. CODE § 221.002 (VERNON 2005).

ticular sites. Also, companies accept members who may select one of its owned or managed properties for an interval in exchange for a fee.

All these forms of shared ownership in vacation properties must compete with direct individual ownership and hotel-room rentals. The concept of timeshares as a way to increase the utility of real estate is not distinct in principle from other uses. Similarly, the individuals and businesses that own and deal in them are not distinct from the people in the competing forms of recreational land use. All forms of exploitation and marketing compete with the others.

People at every level of sophistication employ others who specialize in a field—like brokers—to help them. Because the resale market for timeshare is both competitive and dispersed, it is especially suited to the efficiency of intermediaries. Reselling owners often employ a real-estate broker—one in that region, one affiliated with the resort's developer or one active nationally like Stroman. The developers themselves use third-party brokers, too, and brokers use each other.

3. *Stroman Realty.*

Stroman is among the largest real-estate brokers specializing in the resale of timeshares for individuals. Founded in 1979, its only office is in Conroe, Texas, a town just north of Houston. Each of its agents is licensed in Texas as a real-estate agent or broker. Under the Texas scheme, a broker may sell independently, but an agent must work under the supervision of a broker. Stroman has brokered deals with buyers and sellers from 50 states and 86 countries. It has sold properties located at 1,250 resorts, in 47 states, and 29 countries. It is also affiliated

with Electronic Realty Associates, Inc.—an international network of brokers.

Through Stroman and similar brokers, people may shop the world without the expense of traveling or pressure of a sales talk. It reaches potential customers through direct mail, telephone, the Internet, and national and local newspapers. In 1997, it spent about $3 million on promotion. In addition to general advertisements, Stroman shows individual properties on its website. It has a computer system—costing over $450,000 each year—that matches buyers and sellers. It supports over 160 toll-fee numbers.

Stroman collects (a) a fee for listing a property and (b) a brokerage commission on sales. When a seller contacts Stroman, he pays $499 to list his timeshare in its database. These fees are 94% of Stroman's income. Commissions are Stroman's other source of income. After Stroman matches a buyer with one of its registrants, if they conclude a sale, it takes a commission—the greater of $750 or 10% of the sale price. Because the average sale price is below $7,500, Stroman usually receives the flat-fee minimum. The small value of the transactions suggests the difficulty of an owner's economically marketing the timeshare himself and the importance of broad-based alternatives for the owner.

4. *Licensure & Disclosure.*

Richard T. Farrell, Secretary of the Department of Business and Professional Regulation for the State of Florida, and Jim Antt, Jr., Commissioner of the Department of Real Estate for the State of California, are trying to force Stroman to comply with their licensing fee, disclosure, escrow, and advertising rules when it deals with buyers or sellers who are

their residents. They say that they are required to regulate the timeshare resales to protect their citizens. Specifically, they posit that they must protect their residents from abusive business practices and fraudulent brokers.

Both California and Florida have retreated from their original position that the location of the timeshare in their state—without more—allows them to regulate every business everywhere that in any way deals with it or its owners. The states now say that Stroman must be licensed and must follow its rules when Stroman contacts—or is contacted by—a seller or buyer in their states. California real-estate rules must be followed when a man in California calls Stroman in Texas to list a property in Kansas to sell to a woman in Minnesota, according to Antt.

California has sent orders to stop dealing with its land and citizens to Stroman in Texas. It has also written the Texas Real-Estate Commission, attacking Stroman. Florida has sued Stroman in its state court to enjoin it from violating Florida's equally broad regulations.

5. *Regulations.*

The officials are not trying to apply statutes that structure the nature of land interests or establish procedures for the preservation of those interests through deed registrars and similar practices. These laws are not about land titles. They are trade regulations in the narrow sense. Their legitimacy derives from their effect in protecting consumers from bad brokers or brokers from unscrupulous competition—without burdening the national market. Simply put, these are regulations intended to establish a guild of real-estate brokers. Guilds can be a vehicle for establishing standards or for monopolizing a trade.

The states say that they must block outsiders to protect their consumers. Market isolation is not allowed. Necessity is not an argument for avoiding the Constitution's limits on governmental authority; it is, as William Pitt observed, "the plea for every infringement of human freedom."[2] Applying the local rules to out-of-state brokers is not necessary in fact because (a) their substance has already been imposed on the business by a sister state, (b) they bear no rational relation to the claimed protection, and (c) they are preceded by an extensive, fully adequate system of laws.

6. *Rules: Texas.*

Stroman's agents are licensed in Texas. Texas salesmen must complete 12 semester hours—or 180 classroom hours—of college courses, including six hours in real estate. Texas brokers must complete 60 semester hours of approved courses. The original license fee is $70 for salesmen and $300 for brokers. To maintain the license, salesmen must pay a renewal fee of $72 each year and brokers must pay $499 every two years. They both must also attend continuing education courses.

Texas law allows brokers to collect listing fees, and it does not regulate their advertising.

7. *Rules: Florida.*

In Florida, contracts with Florida residents that are procured through agents unlicensed in Florida are void. Florida originally claimed that Stroman and each of its agents who deal with Florida residents have to be licensed in Florida. It later conceded that

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[2] William Pitt, Address to the House of Commons (Nov. 18, 1783).

if the company had a license—and registered with the secretary of state—individual brokers would not need licenses, unless they physically entered the state. These abandonments illustrate that, when it used its regulatory apparatus against Stroman, Florida exceeded its authority to impose itself on interstate commerce; worse, in Florida's state case, it continues to demand individual licensing.

To obtain a Florida license, an agent must complete 63 hours of classroom study and then pay a $185 real estate exam application fee. The licenses must be renewed yearly by completing additional courses and paying $80. Applicants for a broker's license have the same fee requirement, but they must have had 72 classroom hours. Including fees, travel, and lost time, compliance with Florida's examination requirements would cost Stroman over $160,000.

In addition to the licensure requirement, Florida has other restrictions on the timeshare market. Brokers may not collect listing fees from Florida residents. Florida requires that a disclaimer be included in non-Florida brokers' solicitations and agreements when they serve or seek to serve as a broker for Florida residents. An out-of-state broker must be approved by the secretary of state, file annual reports, and consent to service of process in Florida.

8. *Rules: California.*

In California, a person must obtain a California real-estate license to act, advise, or "assume to act" in California as a real-estate salesman. An applicant must pay a $60 examination fee, a $190 licensing fee, and complete a three-semester course in real-estate principles, a course of study one-half of the Texas requirements. Salesmen must take 45 hours of continuing education in the four-year license cycle.

In California, advance fees are allowed only if they are held in a trust account in California until they are spent for the principal's benefit. Brokers must account quarterly to their customers for the fees and send a final accounting. Additionally, materials soliciting fees must be approved by the state before publication.

California permits only its licensees to serve its residents. Specifically, in advertisements, California requires that brokers disclose that what they are doing requires a license. Although advertisements in "newspapers of general circulation" do not require this disclaimer, the state says that if a Californian responds to the national advertisement, only a California licensee may help him.[3]

California has discovered the Internet. Because Californian consumers can read sites posted by foreign brokers, the state says that "someone offering real-estate services on the Internet without a California license could avoid California regulation if they put barriers in place to avoid doing brokerage business with Californians, including a web page legend that their services are unavailable to Californians."[4] That says that a national broker cannot deal with Californians. Imagine the usefulness—to brokers and consumers—of a web page or newspaper advertisement that had disclaimers and rights notices from 50 states, District of Columbia, and Puerto Rico. At least now the Canal Zone can be omitted.

California has one significant, additional requirement. A licensed broker must conduct all his work

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[3] *See* CAL. BUS. & PROF. CODE § 10140.6 (West 2005).

[4] *See* CAL. CODE REGS. tit. 10 § 2770 (2005).

from an office in California. This makes the brokers obtain a certificate of qualification, consent to service of process, and file annual statements. Stroman estimates that the start-up costs alone would exceed $130,000.

9. *The Exception.*

Both Florida and California permit "co-brokering;" they allow their brokers to pay a commission to brokers of another state. To reverse the language, California and Florida allow out-of-state brokers to work a sale in their states as long as they *split their commissions* with local brokers.

10. *Constitution.*

The Constitution confides to the national government the authority over commerce among the states.[5] This responsibility often conflicts with the efforts of states exercising their residual power. When a conflict arises, the question is whether the state's enactment—in effect—implicates the interest in a national, unitary economy. The Constitution created—constituted—the states into an economic union as well as a political one.

In addition to the Commerce Clause, the Constitution addresses other matters of trade. It has provisions that confide to the national government. bankruptcy, currency, weights and measures, and patents; other clauses ban the states from impairing contracts, imposing duties, and charging inspection fees in excess of cost.[6]

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[5] U.S. CONST., art. I, § 8, cl. 3.

[6] U.S. CONST., art. 1, § 8, cl. 4-8; U.S. CONST., art. 1, § 10, cl. 1-2.

Under the Constitution's establishment of an economic union—in the absence of Congressional preemption or withdrawal—state regulation is impermissible where:

(a) in its terms or effect, it prefers local to interstate commerce;

(b) it has more than an incidental, trivial effect on trade among states;

(c) it does not effectuate a legitimate local purpose;

(d) it could achieve the local purpose with alternative means that do not include the discrimination against or burden on interstate commerce;

(e) it has a local benefit that does not exceed the costs to trade; or

(f) it risks that other localities may adopt conflicting similar rules.

11. *Interstate Transactions & Burdens.*

Land is inherently local; it is some place. Its owners, investors, developers, brokers, advertisers, and occupiers are not local; they are Americans and, of course, non-Americans, too. The business of advertising land is at least regional and often national. Timeshares are not local—resale transactions may involve four states. A share of a resort on a Florida beach may be owned by a Arizonian who listed it with a Texas broker who found a buyer in California. The resale business in general and Stroman's business in particular are unquestionably "Commerce . . . among the several states," in James Madison's phrase.[7]

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[7] U.S. CONST. art. I, § 8, cl. 3.

The national government has neither acted to regulate real-estate brokers nor ceded its authority over this aspect of commerce to the states as it did with insurance.[8]

On this record, the traffic in these real-estate interests is national. Timeshares are a component of the vacation-leisure industry. California and Florida are the two leading states for vacation travel.[9] In Florida, 86.1% of owners of timeshares in its resorts live outside of Florida.

California's market is substantially local with 77% of its timeshares owned by Californians. The 23% of outsiders who own California timeshares affect intra-California prices by (a) buying the properties and, thus, keeping the supply tighter and (b) enlarging the market—lowering developer costs through economies of scale. Prices in California affect prices in other states. In 1997, about one-half of Stroman's sales to Californians involved three states: California, the seller's residence, and the location of the property. Obviously, the effects of outsiders on the Florida market are the same.

California inferentially confessed the fact of national market and national marketing by its attempt to restrict advertising from the rest of the country.

Information specialists in the real-estate industry—brokers—are a national phenomenon. Start small. Lake Tahoe real estate does not sell based on whether it is in Nevada or California, except that the price will be affected by the states' differential real-

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[8] McCarran Act of 1945, 15 U.S.C. § 1011 (1984).

[9] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, 784 (123rd ed. 2003).

estate taxes and other complications. Amelia Island, Florida, competes directly with Jekyll Island, Georgia. They compete with each other for the consumers in Ohio. They also compete with alternative resorts in Colorado and Maine.

Based on the effects on the market, including costs to intermediaries, these regulations substantially impede the flow of goods and services among the states. By the states' positions, a man in Sutter Creek cannot use a broker in Dallas to sell a share in Telluride to a woman in Saint Augustine without the brokers complying with the regulations of California, Texas, and Florida. The barriers fail the first test; they burden a national market and interstate transactions in ways that are indisputably non-trivial.

12. *Local Means & Ends.*

If the weight of the barriers the states have imposed were not sufficient, other aspects of their regulations would cause them to fail.

In trade regulation, the term *protectionism* refers to isolating markets through barriers like tariffs, arbitrary inspections, state monopolies, licensing, and outright local preferences. *Consumer protection*, on the other hand, refers to things like ensuring honest weights and measures. The states enjoy the responsibility to administer generally to their populations as long as the restrictions in the Constitution are observed. Even a small burden on trade will not be allowed where the burden does not have a real-world, discernable, and positive effect on the local interest that clearly exceeds the costs of the barrier to outsiders.

A states describing its regulatory schemes for businesses as consumer protection does not mean that

consumers are benefitted in the actual operation or that an illegal end is not accomplished. Intentions do not matter. Labels are not substance. The American Constitution does not depend on the legislators' press releases.

Frequently, the reality of who is protected turns out to be an interest other than the ordinary consumer. To protect consumers local governments have compelled these acts to be done locally: cantaloupe packaging,[10] milk pasteurization,[11] shrimp heading,[12] lawyers' residences,[13] and trust company ownership.[14] They have banned the export of minnows[15] and the import of garbage[16] and wine.[17] All of these things were done in the name of health, safety, honesty, and the little children, but none had any congruence with its goal, and each means selected had the effect of removing a market from interstate competition. It is the same story here.

Even assuming that the California and Florida regulations materially helped consumers and did not

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[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[11] *Dean Milk v. City of Madison*, 340 U.S. 349 (1951).

[12] *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

[13] *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[14] *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 28 (1980)("this [Florida] statute is 'parochial' in the sense that it overtly prevents foreign enterprises from competing in local markets."), *See also J.R. Brooks & Son, Inc., v. Reagan*, Civ. C-71-1311 SC (N.D. Calif. 1973) ("[California] arbitrarily and unreasonably burdens interstate commerce in Florida avocados by imposing a standard which is irrational. . . .").

[15] *Hughes*, 441 U.S. 322 (1979).

[16] *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

[17] *Granholm v Heald*, 125 S.Ct. 1885 (2005).

materially hinder national trade, the risk of inconsistent requirements for a single transaction or a single broker would still make them impermissible.[18] The states' schemes are substantially similar, but Stroman would have to comply with 50 sets of rules, a nontrivial administrative burden. There are over 87,000 units of local government in America; trade barriers and burdens quickly aggregate.[19] What cannot be done directly by express local preferences cannot be done indirectly by paperwork and fees.

13. *Consumers & Protection.*

The regulations address two aspects of brokerage. First, fairness in some sense is sought by screening advertising and banning advance fees. Second, availability is sought for enforcement. In their aggregate, the regulation of out-of-state brokers' contact with people in Florida and California serves, the states say, to protect those people from fraud. Land fraud is as old as this country. Both the national and regional governments have long been busy in working to reduce it. The problem is that these restrictions do not diminish fraud.

14. *Advance Fees.*

The states say that brokers like Stroman collect fraudulent fees. An owner pays the broker—$499 for Stroman—to induce him to list the timeshare. If the unit is sold through the broker's efforts, he collects a commission in addition to the listing fee. The arrangements between an owner and a broker could

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[18] *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

[19] U.S. CENSUS BURAEU, U.S. DEPT. OF COMMERCE, 2002 CENSUS OF GOV'T I (2004).

take a wide variety of forms, but this is the business model that Stroman and many others have adopted.

Intrinsically, listing fees are unexceptional. Even Florida's attorney general concedes that, "most resale companies require . . . a $300 - $500 advance listing fee before the sale of [a] timeshare can take place.[20] California and Florida say, however, that in practice the consumer's benefit obtained from the listing fee is wholly illusory. This claim is based on the rate of sales from the paid listings. In 1997, Stroman collected over 18,000 fees and sold 680 timeshares—a 3.7% sales rate. Both states say that this low rate proves that brokers who collect fees have no incentive to sell, cheating the owner. This is statist-populist nonsense. The states have no example of a broker who guarantees a sale—at the asking price or at all. This modest number of sales—if the average price is $7,500—equals over $5 million.

The advance fee serves two useful economic functions. First, Stroman charges a fee plus a 10% commission. Others charge no fee and a 25-30% commission. Each system of compensating brokers is designed in the hope that it covers both their costs and a profit. Advance fees are no more intrinsically unfair than high commissions; both must in practice satisfy the broker and consumer. If advance fees are unreasonable to the consumers, they will shift to high-commission brokers.

Second, advance fees serve as a screen. Payment of a fee to initiate the promotion requires the seller to decide that he is serious about selling, asking a

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[20] Charlie Crist, Office of the Attorney General of Florida, (posted Aug. 8, 2004) <http://myfloridalegal.com/newsbrie.nsf/OnlineAlerts/982958C2786805568525703C006A0739>.

practical price, and offering a property that may likely be attractive to buyers. These are things that Stroman cannot investigate economically and that the selling consumer has within his knowledge.

Stroman's clients are not being duped. Sellers who pay the $499 fee are told that it is non-refundable. They are also told that there is no guarantee when, if, or for how much the timeshare will sell. The fee is then applied, in part, to (a) local advertising, (b) national advertising, (c) direct mail, and (d) listing in Stroman's on-line data base. This is, in fact, done for the people who pay the fee.

The states have no reliable information that those services were not valuable to the owners. They have a lot of data, but it is neither reliable nor cogent. For example, Florida relies on a study that represents that one-half of resales are by owner. The problem with the study is that the population of respondents was 16. Eight of 16 respondents is correctly stated as: the percentage of timeshares resold by owner is 50%, plus or minus 25%. For resales through a newspaper advertisement, the statistic is 6%, plus or minus 12%, in round numbers. While the study's arithmetic is correct, it has no application in the real world.

Each segment of a large, diverse market like real estate will develop techniques that address the needs of the buyers and sellers if people are left free. Full-service brokers, discount brokers, on-line brokers, and others succeed or fail based on the attractiveness of their services to the consumers. Rather than accuse Stroman of dishonest sloth, the states should consider the nature of the competitive resale market. Most important, they should consider the increase in costs to the consumers—local and foreign—from their restrictive regulations. Limiting Florida time-

share owners to Florida brokers is an attempt to capture the Florida market for local brokers. The consumers are "protected" by a reduced opportunity to market their units, lowering prices and increasing costs.

Over one-half of the timeshare resorts do not offer a program to help owners resell their units. Additionally, about one-quarter of all resorts are actively selling new properties in direct competition with their reselling owners. The developers have resources for marketing and economies of scale. Reselling owners need alternatives.

Resales are a tough market—on or off site. Owners often are not allowed to post for-sale signs on their units. Local resellers have the advantage of showing the unit offered for resale. They can also engage in high-pressure sales talks to close a deal. To Stroman's offsite brokers, these are unavailable tactics. It has compensated with a valuable tool: its diverse client base. The only way to reach buyers and sellers across the world is with advertising.

Florida says that it does not prohibit brokers from collecting fees to cover marketing costs, just that the broker must do it on closing the sale. Collecting the fee post-sale eliminates its usefulness to the broker. Banning the advance fee as abusive is factually unsupported as a matter of law. Florida may be able to keep its residents from charging Floridians advance fees, but it has no authority to bar them for the whole country.

15. *Enforcement: Substance.*

The states must have identified a substantive evil and found a remedy that is narrowly crafted to limit speech as little as possible and to disrupt commerce

as little as possible while actually achieving its purpose.[21] They did not.

What they did say, once they finished their sales-ratio argument, is that out-of-state brokers may be dishonest or incompetent. In principle that is true; it is also true of brokers in California and Florida. The states say that that possibility creates a necessity for intrusion. Both states, as well as the other 48, have laws against actual dishonesty and remedies for sub-standard performance. Every state regulates real-estate brokers. The regulations are remarkably similar. California has already had government-to-government contact with Texas authorities.

Even if Stroman did take advantage of its clients, the states need not impose regulations on brokers everywhere to protect their citizens because they already have laws in place. Stroman and its sales force have Texas real-estate licenses. The states and their consumers have a Texas forum for claims under Texas law or theirs.

Exhibiting parochialism, the states argue that Texas has no interest or resources to protect consumers across the nation. That argument is disingenuous. The nation's consumers are not the concern of any particular state, including Florida and California. Texas routinely enforces claims by outsiders against Texans in its courts. More important, the Founders thought of this hypothetical problem; they included the Full Faith and Credit Clause and diversity jurisdiction in the Constitution.[22]

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[21] *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[22] *See* U.S. CONST., art. IV, § 1.

Californians and Floridians have the option of choosing their own states in the forum clause of the contract. Stroman's form contracts say that they are to be governed by the law of the location of the escrow agent. It lists a Texas agent, but the seller may use a different agent if he chooses.

Consumers have national protection through the Federal Trade Commission and local protection through their attorney general's office. The states themselves offer consumer information web-sites. The Better Business Bureau and the American Association of Retired People also furnish warnings. A prudent consumer has the benefit of knowledge.

Finally, Californians and Floridians may exercise their liberty not to deal with brokers in remote places. Keep in mind that "remote" and "different state" are not synonymous. Pensacola is closer to Houston than it is to Miami. Palm Springs is closer to El Paso than it is to Eureka.

16. *Enforcement: Jurisdiction.*

Florida and California insist that they must be able to exercise jurisdiction over Stroman in their states. They may be able to sue him, depending on the facts of the case, irrespective of his licensure.[23] Without submitting to their licensing laws, Stroman consents to jurisdiction in states where it conducts continuous and systematic business; where it does occasional, episodic, modest business, jurisdiction would depend.[24]

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[23] FL STAT. ch. 48 193 (1996); CAL CIV CODE § 410.10 (West 2005).

[24] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Helecopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984).

These states want to have jurisdiction over out-of-state businesses automatically, gratuitously as a *price of admission* to their markets—an interstate tariff that costs outsiders their rights.

17. *Advertisements & Marketing.*

California and Florida say that Stroman's "targeted" direct mail overwhelms their residents, justifying their intervention. The states say the campaign is aggressive and frenzied. Low-key marketing may well be a contradiction.

California offers nothing to indicate to a rational mind that the mail Stroman sends to California is worse in any sense than that routinely sent among Californians or from Californians to other states. The same with Florida. Junk mail is not fraud. Obnoxious, garish mail is not fraud. The advertisements among a consumer's mail are information. That information may be valuable or trash, elegant or rude, political or commercial, religious or recreational. The consumer has a remedy, the recycling bin. Commercial solicitations are important to consumers, for they are learning about goods and services and prices and trends. Floridians and Californians are more capable than their governments think. Stroman's direct-mail pieces cannot compel or abuse anyone. "Targeted" is a meaningless slogan; Stroman, like everyone else, wants to send its mail to people who are likely to want its service. The bulk of it is directed by a program that uses zip codes as its selection criteria. Stroman uses public records to locate timeshare owners; this is not illegal, it is marketing.

California's regulation of advertising seems excessive even in this day of courts' supinely ignoring the Constitution's text in favor of the regulatory state.

Prior restraint even offended the British Constitution before our Revolution.[25] Assuming the screening requirement and content requirements to be facially constitutional, the states' extension of those restraints to the commerce in information among the states contravenes the national commerce authority and imposes a burden on the free flow of information among the states.

California and Florida insist that their regulations do not discriminate against outsiders because the rules also apply to insiders. Fortunately, that is not the question. If a state wants to treat it residents to extensive regulation—whether the rules are sound policy or "partial measures," in another phrase of James Madison's—that is an internal policy choice of the state.[26] For instance, although Florida could ban the existence of real-estate brokers within its borders, it may not disrupt the opportunity of its citizens to seek the services they need from people in other states. In asserting nationwide control over people who deal with Californians, the state is imposing its local rules on the nationwide brokerage business and timeshare market.

The arbitrariness of borders and the proximity of people to other states offer the best illustrations. An advertisement in the *Chicago Tribune* is likely to be read by consumers in Illinois, Indiana, Wisconsin, and Michigan. The Memphis Commercial Appeal will cover parts of Tennessee, Arkansas, and Mississippi. Neither the advertising itself nor the people offering

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[25] WILLIAM BLACKSTONE, COMMENTARIES, *152 (William Draper Lewis ed., Philadelphia, Rees, Welsh & Co., 1898).

[26] THE FEDERALIST, NO. 58, at 397 (James Madison, contribution by Alexander Hamilton) (Jacob E. Cooke ed., 1961).

their services may be compelled to comply with all three states' rules.

Proximity is not a condition, however. Wyoming may restrict admission to the practice of accountancy, but it may not keep a resident of Sheridan from getting his tax advice from an accountant in Ashville, North Carolina. Wyoming may not ban from its borders information about goods and services available in the other 49 states.[27] Requiring that an advertisement carry disclaimers is a form of banning; it erodes the value of the advertisement by increasing cost though bureaucratic clutter. What a state may not do directly, it may not do indirectly through throwing sand in the gears.

18. *Conclusion.*

State regulations that protect consumers cannot constitutionally stand if they work by burdening interstate commerce. Florida and California persist in arguing that the laws are neutral between locals and outsiders because they apply to resident and nonresident brokers alike. They miss the point, willfully. By permitting only Floridians to serve Floridians and Californians to serve Californians, they are partitioning the interstate market. They thwart Texans, Nebraskans, Rhode Islanders, and American commerce.

The local protections are illusory. Residence requirements are suspect. Where a broker sleeps has nothing to do with his competence.[28] Residence requirements for escrow accounts are equally arbitrary. It is true that every broker in Oklahoma is free to

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[27] *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

[28] *See Supreme Court of New Hampshire*, 470 U.S. 274 (1985).

move to California, at least since its law against poor immigrants was voided by the Supreme Court.[29]

The states are free to adopt consumer protection laws that hurt them and help real-estate brokers; that is a policy choice. If the states choose a means that impedes commerce among the states, they will be obliged to find another technique. Since these regulatory burdens do not accomplish their stated purpose, their imposition appears irrational, but because they have the direct consequence of isolating the local markets from trade from other states, the rules are not irrational—just illegal.

These regulations substantially restrict access to consumers from brokers in other states; their effect is to reserve the California and Florida consumers for California and Florida brokers. States cannot horde their minnows or their vacationers.

Because the requirements are comparable across the country, there is no material benefit to multi-state licensing; on the other hand, the cumulative administrative cost and risk of inconsistent regulations makes the imposition of them conflict with the principle of a national economic union, even if there were substantial local non-protectionist gains. The existence of alternatives that accomplish the legitimate local interest without impinging trade among the states implies protectionism.

Because a timeshare is a license in the technicalities of land law, they are the equivalent estate of a hotel room. Requiring a national hotel chain to take reservations from Californians only with an agent in California is beggar-thy-neighbor protectionism. The

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[29] *Edwards v. California*, 314 U.S. 160 (1941).

effect is not better brokers; it is richer, uncompetitive local brokers and poorer consumers through the balkanization of the American market for vacation properties.

That Stroman is guilty of sharp practices is a theme in the states' papers, but no facts support it. Shorn of its pretenses, the states' position is reduced to asserting the *necessity* of regulation because Stroman—like others of his kind—"had the defective moral quality of being a stranger."[30]

On Stroman's re-urging of its motion for summary judgment, the imposition of local licensing requirements on Stroman by these officials of California and Florida will be enjoined.

Signed July 28, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States District Judge

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[30] BREE HARFF, TALES OF THE ARGONAUTS (1872), *reprinted in* 2 THE WRITINGS OF BRET HARTE 1, 210 (Houghton, Mifflin & Co. 1903).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action H-98-283

STROMAN REALTY INC.,
Plaintiff,

versus

JIM ANNT, JR. AND RICHARD T. FARRELL,
Defendants.

Final Judgment

1. *Declaration.*

On the renewed motion of Stroman Realty, Inc., it has a judgment as a matter of law that the these officials would violate the Constitution if they were permitted to continue enforcing the regulations within their responsibilities against Stroman.

2. *Antt.*

Antt's application of California's regulations on real-estate brokers in California Business and Professional Code, Sections 10,000 to 11,200, to non-California timeshare resellers like Stroman Realty, Inc., unconstitutionally obstructs commerce among the states, irreparably injuring Stroman. Stroman's only remedy against a state official for assertions of authority that transcend the Constitution's limits is an injunction. A declaratory judgment is inadequate because of the opportunity for inconsequential modifications in the rules or a change of tactics to achieve the same end.

Jim Antt, Jr., and his successors as Commissioner of the Department of Real Estate for the State of California are permanently enjoined from enforcing Sections 10,000 to 11,200 of the California Business and Professional Code and successor and derivative rules against Stroman Realty, Inc., in the conduct of its of its business reselling timeshares.

3. *Farrell.*

Farrell's application of its regulations on real estate brokers in Florida Statutes Annotated, Chapters 475 and 721, to non-Florida timeshare resellers like Stroman Realty, Inc., unconstitutionally obstructs commerce among the states, irreparably injuring Stroman. Stroman's only remedy against a state official for assertions of authority that transcend the Constitution's limits is an injunction. A declaratory judgment is inadequate because of the opportunity for inconsequential modifications in the rules or a change of tactics to achieve the same end.

Richard T. Farrell and his successors as the Secretary of the Department of Business and Professional Regulation of the State of Florida are permanently enjoined from enforcing Chapters 475 and 721 of the Florida statutes and successor and derivative rules against Stroman Realty, Inc., in the conduct of its business reselling timeshares.

Signed July 28, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-283

STROMAN REALTY, INC.,
Plaintiff,

v.

JIM ANTT, JR., *et al.*,
Defendants.

Aug. 28, 1998

OPINION ON DENIAL OF MOTIONS TO DISMISS

HUGHES, *District Judge.*

1. *Background.*

Stroman Realty is a broker in the secondary market for timeshares in land, usually resort properties. Its only offices are in Texas. The states of Florida and California are trying to force Stroman to comply with licensing, disclosure, escrow, fee, and advertising requirements when it deals with people or land in their states. Florida has sued Stroman in Florida state court to enjoin it from violating Florida's regulations.

Stroman wants to enjoin California and Florida officials from enforcing the statutes. It says they impermissibly burden interstate commerce. The officials claim that the federal judicial authority does not

extend to them and that, in any event, its use against them in southern Texas is impermissible. They also urge that this case should be dismissed for improper venue, inconvenient forum, and failure to state a claim, and they argue that the court should abstain. The judicial power of the United States extends to these parties, and this particular court has a sufficiently direct relation to them for it to exercise that power over them. The court declines to dismiss or abstain.

2. *National Judicial Power.*

The Constitution excludes from the "Judicial power of the United States" suits "against one of the United States by Citizens of another State." U.S. Const., amend. XI. This provision, which was a reaction in 1795 to a diversity suit, does not apply to suits to enjoin state officers from acting unconstitutionally. *Ex parte Young,* 209 U.S. 123, 159-160, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908). *See also* 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4232 (2d ed. 1988). This court may hear Stroman's suit to enjoin officials in California and Florida from enforcing regulations that it claims unconstitutionally interfere with interstate commerce. *See In re SDDS, Inc.,* 97 F.3d 1030, 1035-36 (8th Cir.1996) (noting that Eleventh Amendment did not prohibit a declaratory judgment action for a state's "ongoing violation of the dormant commerce clause" and holding that it did not bar a federal case for enjoining the state from relitigating in state court issues a federal court had already decided).

The defendants rely on a recent installment in the judicial accommodation of states' using Eleventh

Amendment penumbras to evade responsibility.[1] *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). In this recent case, five members of the Supreme Court, in two opinions, agreed that the Eleventh Amendment barred the Couer d'Alene Tribe from proceeding with its suit in federal court to establish ownership of submerged lands against the title of the state of Idaho. The four dissenters found that the case fell squarely within the exception for officers' being sued to stop unconstitutional acts; they would have allowed the suit to proceed.

The defendants' reliance is misplaced for these three reasons:

A. Both defendants disingenuously refer to portions of Justice Kennedy's opinion that only Chief Justice Rehnquist joined and that the Court's other seven members expressly declined to join; two does not a majority make.

B. Even the principal opinion emphasized "the continuing validity of the *Ex parte Young* doctrine" and the "presumption" that "in most cases" when a plaintiff seeks prospective relief in federal court

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[1] *See generally Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) (inventing a generalized "sovereign" immunity irreconcilable with the nature of the Constitution as a whole, the Fourteenth Amendment, *Texas v. White,* 7 Wall. 700, 74 U.S. 700, 19 L.Ed. 227 (1868), and reason). *See also* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1488 n. 251 (1987) (noting that "no state constitution explicitly provided for sovereign immunity, and that, on the contrary, the charters of several states expressly provided that the state could be sued, in conformity with the general rule that corporations were suable," citing John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum. L.Rev. 1889, 1896-98 (1983)).

against state officers "ordinarily" the Eleventh Amendment is no bar. *Id.* at ----, 117 S.Ct. at 2034, 2038, 2040. It also emphasized the limited nature of the case in saying, "Under these particular and special circumstances, we find the *Young* exception inapplicable." *Id.* at ----, 117 S.Ct. at 2043. Stroman's case is classic, not peculiar.

C. The majority's distinguishing of the tribe's action from a typical action to enjoin officers from committing unconstitutional acts largely turned on two facts. First, the suit was essentially an action to quiet title—in effect a transfer of land instead of money—which is plainly prohibited by the current solicitude for governmental power over the rule of law. *Id.* at ----, 117 S.Ct. at 2040, 2043. Second, the Couer d'Alene Tribe did not wish simply to dispossess Idaho of the property; rather, it sought to remove the property from the scope of Idaho's jurisdiction and its governmental authority altogether, implicating the essence of the state's sovereignty. *Id.* at ----, 117 S.Ct. at 2040-41, 2044. Those bases are absent in this case.

This suit is properly in federal court.

3. *Personal Jurisdiction.*

The defendants argue that this court lacks personal jurisdiction over them. They say that because enforcement of their statutes against Stroman occurs within their states, they do not have minimum contacts with Texas. This is disingenuous sophistry.

The exercise of judicial power requires a connection between the defendant and the court's territory. All that the Constitution requires is that people have fair warning that their activities may subject them to judicial action in a particular place by a particular government. A forum's courts have specific jurisdic-

tion over a defendant when his particular acts with respect to the forum give rise to the dispute; they have general jurisdiction over the defendant when he has continuous and systematic contacts with the forum even if the dispute does not arise from his acts in the state. *Helicopteros Nacionales de Colombia, S.A., v. Hall,* 466 U.S. 408, 414-16 & nn. 8-9, 104 S.Ct. 1868, 1872-73 & nn. 8-9, 80 L.Ed.2d 404 (1984); *Jones v. Petty-Ray Geophysical Geosource, Inc.,* 954 F.2d 1061, 1068 (5th Cir.1992). Texas's long-arm statute extends as far as federal due process requirements allow. *Guardian Royal Exch. Assurance, Ltd., v. English China Clays, P.L.C.,* 815 S.W.2d 223, 226 (Tex.1991).

This court plainly has jurisdiction over these defendants; it is part of a government that is clearly and directly related to the two states and their governments. The states have somewhat less attachment to southern Texas than to the United States, but they are seeking to regulate the business of a South-Texas land dealer and his numerous South-Texas customers. The individual officers are asserting a nationwide authority to regulate business, and they are applying their authority against a Texan in Texas. The statutes in question are neither consumer protection measures nor land title regulations: they arepure and simple-broker regulations. A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from the officers' attempt to impose their power on a Texan.

The court has specific jurisdiction over these defendants. California has sent cease and desist orders to Stroman in Texas. It has attacked Stroman in letters to the Texas Real Estate Commission. Florida has written Stroman in Texas demanding that it disclose

documents. It has used the Texas Attorney General's office to get information on Stroman. These activities in Texas are not fortuitous or attenuated; they are part of a deliberate effort to exert the officers' authority in Texas. *Burger King v. Rudzewicz,* 471 U.S. 462, 472-75, 105 S.Ct. 2174, 2182-85, 85 L.Ed.2d 528 (1985); *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 320, 66 S.Ct. 154, 158, 160, 90 L.Ed. 95 (1945). The officers' particular acts with respect to this forum give rise to this dispute; they have used Texas law and Texas government in their efforts to regulate Stroman.

Even if the dispute did not arise from their particular acts with respect to this forum, the court has general jurisdiction over them because the defendants have had continuous and systematic contacts with this forum. Despite the *officers'* adamant claims that they have no contact with Texas, both states have offices in this city. *See*SOUTHWESTERN BELL, GREATER HOUSTON BUSINESS WHITE PAGES 129, 265 (1998) (listing the California State Board of Equalization, the State of California Franchise Tax Board, and the Florida Department of Revenue-Houston Service Center). While the officers' particular bureaucracies may not have offices in Texas, the officers are part of a larger administrative apparatus that funds and otherwise supports them, and their whole operations have a permanent presence in Texas.

Three other points illustrate the hypocrisy of the defendants' jurisdictional protests. First, the California Department of Real Estate has this on one of its Internet sites:

If you are not properly licensed in California, you may not solicit California residents. To do so would be considered conducting activity for which a real

estate license is required. Because the Internet can be read by anyone in any location, advertising your services on the Internet would be considered soliciting a California resident when read by a resident of this state.

If you conduct activity which requires a California real estate license, but you are not a California licensee, you could be subject to administrative sanction such as a Desist and Refrain Order.

Apparently California has jurisdiction over anyone using the information superhighway-the entire World Wide Web-but is subject to jurisdiction only within its own borders. Most courts-including courts in California and Florida-have found on-line contacts alone to be an insufficient basis for exercising personal jurisdiction. *See* Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law,* 35 Hous. L.Rev. 453, 469, 474, 476, 480 (1998).

Second, both states seek to enforce their statutes in situations that involve only non-residents as long as the land is in the state. For example, Florida might try to regulate an Oklahoman's selling a Nebraskan a Miami timeshare through a Kansan as a broker, and California might try to regulate a South Dakotan's selling a Marylander a Napa Valley timeshare through a Wisconsin broker. The court invited the defendants to disavow the nationwide scope of their power; they declined. Under their view of the scope of their authority, they would also be able to regulate a Filipino's selling a Belgian an Orlando or San Francisco timeshare through a Pakistani broker.

Third, Florida has asserted lack of personal jurisdiction because "Petitioner has absolutely no pres-

ence in Texas" and "Petitioner has no physical presence in Texas." (Petition for Writ of Mandamus at 14, 22.) In the same breath, Florida says, "Stroman is not insulated from suit in other states simply because it is not physically present in them." (*Id.* at 23).

This is double-speak. On the one hand, they argue that they may regulate Stroman *even though* it is from a different state, *even though* it conducts its business from a different state, and *even though* it has only tenuous connections with their states. On the other hand, they argue that this court does not have jurisdiction over them *because* they are from different states, *because* they conduct their business from different states, and *because* they have only tenuous connections with this state.

They cannot have it both ways. They can't have their cake and eat it too. What's good for the goose is good for the gander. It's a two way street. It takes two to tango. These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice. *See McDonald v. Mabee,* 243 U.S. 90, 91-92, 37 S.Ct. 343, 343-44, 61 L.Ed. 608 (1917) (Holmes, J.)

These defendants are subject to this court's jurisdiction.

4. *Inconvenient Forum.*

The defendants also claim that this forum is inconvenient. Florida baldly asserts, "It is far more convenient for Stroman to come to Florida-as it has done for purpose [*sic*] of soliciting timeshare sellers and buyers-than it is for Petitioner to come to Texas."

(*Id.* at 18.) How that could conceivably be true is unstated.

The inconvenient forum doctrine suggests that a court decline to hear a case that would be more equitably decided by another jurisdiction's tribunals. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *Forsythe v. Saudi Arabian Airlines Corp.,* 885 F.2d 285, 290 (5th Cir.1989); *Jeha v. Arabian American Oil Co.,* 751 F.Supp. 122, 124 (S.D.Tex.1990), *aff'd*,936 F.2d 569 (5th Cir.1991). The factors to consider in an inconvenient forum inquiry are:

A. Is another forum available for the entire case, and can all parties come within its jurisdiction?

B. Is the alternative forum adequate?

C. Do the parties' private interests suggest the chosen or alternative forum?

D. Does the chosen forum, the United States, or the alternative forum have a public interest, substantive policy, or administrative interest that suggests the chosen or alternative forum?

Haynsworth v. Lloyd's of London, 933 F.Supp. 1315, 1323 (S.D.Tex.1996), *aff'd sub nom. Haynsworth v. The Corporation,* 121 F.3d 956 (5th Cir.1997), *cert. denied sub nom. Haynsworth v. Lloyd's of London,* 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998); *Jeha,* 751 F.Supp. at 124.

This forum is proper. California and Florida might be both available and adequate, and both states would prefer not to have the case here. The states assert that this case affects land titles in their territory, making its outcome critical to the economic base of their polities. The broker has at no time sought to invalidate either state's regulations about what is required to pass title or what kinds of title

may be passed. This case is not about land; it is about brokers, especially interstate competition among brokers. The interests called "timeshares" may not be a real interest that would be recognized at common law, although the states both say that they are to be regulated *as if* they were real estate. The states have not identified one interest beyond potential revenue and market protection; the states are not protecting their consumers since the consumers are Texans or other outsiders who are fully protected by their own states. Stroman wants it heard here. Texas has an interest in having the claim heard here given that Stroman is a local business and that many of its customers are Texans.

The court will not transfer the case on inconvenient forum grounds.

5. *Venue.*

Both defendants have objected to venue in the Southern District of Texas. Venue is proper here if "a substantial part of the events or omissions giving rise to the claim occurred" in this district. 28 U.S.C. § 1391(b)(2) (Supp.1998). The defendants argue that the substantial part of events giving rise to the claim-the enforcement of their regulations-occurred in their states. The court disagrees. Stroman complains of what the defendants have done in Texas: trying to regulate business he does in Texas with non-Californians and non-Floridians that happen to involve property in the defendant states. The contested regulation has included sending letters to Stroman and invoking Texas government to regulate Stroman. Venue in this district is wholly proper.

In the case most factually analogous to this one, however, the Supreme Court has held that venue is

improper. *Leroy v. Great Western*, 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979). (Incidentally, none of the parties appear to have referred to *Leroy*.) An Idaho statute restricted purchases of stock with corporations having substantial assets in Idaho. Great Western, a Delaware corporation with Dallas headquarters, attempted to purchase stock in a Washington corporation, Sunshine, that had most of its assets and its executive offices in Idaho. Great Western complied with federal reporting requirements and filed documents with the Idaho Director of Finance. The Department of Finance sent objections and requests for additional information to Great Western in Dallas and then delayed the effective date of the tender offer.

Great Western sued the Idaho officials in the Northern District of Texas. They contested venue and jurisdiction in a special appearance. Finding that it had jurisdiction, the district court found venue improper under the general federal venue statute but proper under the Securities and Exchange Act's special venue provision. It also found that the Idaho act impermissibly burdened interstate commerce. The court of appeals affirmed, holding, in the words of the Supreme Court, that "an Idaho official who seeks to enforce an Idaho statute to prevent a Texas-based corporation from proceeding with a national tender offer has sufficient contacts with Texas to support jurisdiction" and concluding that "venue was proper in the Northern District of Texas under the general federal venue provision . . . because the allegedly invalid restraint against Great Western occurred there and it was accordingly 'the judicial district . . . in which the claim arose.'" *Id.* at 178, 99 S.Ct. at 2714 (last ellipsis original).

The Supreme Court reversed solely on venue grounds without reaching the merits or the jurisdictional question. It rejected the circuit court's conclusion that Dallas was where the Idaho defendants "'invalidly prevented Great Western from initiating a tender offer for sunshine.'" *Id.* at 183, 99 S.Ct. at 2716. It also rejected the argument that Great Western needed to treat the suit as arising in Dallas to sue in one place officials from Idaho and officials from other states (who had since been dismissed). The complaint raised no justiciable issues against the other defendants, and the venue statute did not allow Great Western to rely on the similarity between the claims or the convenience to itself. Seemingly most relevant for present purposes is this:

[T]he claim involved has only one obvious locus—the District of Idaho. Most importantly, it is action that was taken in Idaho by Idaho residents—the enactment of the statute by the legislature, the review of Great Western's filing, the forwarding of the comment letter by [the deputy administrator of securities of the Idaho department of finance], and the entry of the order postponing the effective date of the tender by [the finance director]—as well as the future action that may be taken in the State by its officials to punish or to remedy any violation of its law, that provides the basis for Great Western's federal claim. For this reason, the bulk of the relevant evidence and witnesses—apart from employees of the plaintiff, and securities experts who come from all over the United States—is also located in the State. Less important, but nonetheless relevant, the nature of this action challenging the constitutionality of a state statute makes venue in the District of Idaho appropriate. The merits of Great Western's claims may well depend on a proper interpretation of

the State's statute, and federal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere. . . .

> We therefore reject the Court of Appeals' reasoning that the "claim arose" in Dallas because that is where Great Western proposed to initiate its tender offer, and that is where Idaho's statute had its impact on Great Western. Aside from the fact that these "contacts" between the "claim" and the Texas District fall far short of those connecting the claim and the Idaho District, we note that this reasoning would subject the Idaho officials to suit in almost every district in the country. . . . In short, the District of Idaho is the only one in which "the claim arose" within the meaning of § 1391(b).

Id. at 186, 99 S.Ct. at 2718.

The parallels between that case and the instant one seem to preclude venue in this district. For three reasons, however, the court finds that venue here is proper.

First, the principle derived from that case is of limited vitality today. Congress has dramatically changed the venue statute. The relevant part of the venue statute applied by the Supreme Court provided for venue "in which the claim arose." *Id.* at 178 n. 8, 99 S.Ct. at 2714 n. 8. As revised, the same section now provides for venue "in which a substantial part of the events or omissions giving rise to the claim occurred." Leading commentators have questioned whether the case has continued utility. *See* 15 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3806 (2d ed. 1986) ("Amendments

to the general venue statutes in 1990 have made the Leroy case of historical interest only."). Even before the amendments, *Leroy* was severely criticized for its lack of clarity. *See, e.g., Dody v. Brown,* 659 F.Supp. 541, 546-50 (W.D.Mo.1987) (Wright, J.); *Pfeiffer v. International Academy of Biomagnetic Med.*, 521 F.Supp. 1331, 1341-43 (W.D.Mo.1981) (Collinson, J.). The case itself suggested that a plaintiff could choose venue in an "unusual case" where multiple districts "may be assigned as the locus of the claim" because of their "approximately equal plausibility-in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* the plaintiff)."

Second, the transactions giving rise to the dispute in the Idaho case and this one are fundamentally different:

- Great Western was attempting to buy stock in a company that apparently had its principal place of business in Idaho. The transaction involved a Texas party (Great Western), an Idaho party (Sunshine), and an Idaho *res* (the company stock).
- Stroman is attempting to broker the sale of land in Florida and California. The transactions may involve a Texas party (Stroman, the broker), another Texas party (the seller), another Texas party (the buyer), and a California or Florida *res* (the timeshare).

Most of the transactions Idaho sought to regulate involved Idaho. Most of the transactions California and Florida seek to regulate, by contrast, may not involve those states.

Third, the enforcement efforts by the Florida and California officials are significantly greater than those

by the Idaho defendants. The Idaho officials only sent a telecopy letter objecting to the tender offer and requesting more information to Great Western and then entered an order delaying the tender offer's effective date. In this case, both states' officials have sent letters or cease-and-desist orders to Stroman. Alone, that might not be enough to establish venue, but coupled with their invoking the power of the offices of Texas government, it makes this district a proper venue. All of the Idaho defendants' actions were in-state; some of the California and Florida defendants' actions have not been in-state. The Supreme Court did not speak to whether venue might have been proper in Texas if Idaho had used Texas agencies in regulating Great Western. Moreover, Idaho sought to regulate a stock purchase; Florida and California seek to regulate a broker's conduct in Texas. These differences in the present defendants' actions from those of the Idaho officials render this district a proper venue. *Cf. Jarrett v. North Carolina*, 868 F.Supp. 155, 158-59 (D.S.C. 1994) (holding that North Carolina official's mailing files to an attorney in South Carolina was insufficient by itself to establish venue or jurisdiction over North Carolina officials in South Carolina).

6. *Abstention.*

Florida has cursorily asked the court to abstain pending resolution of the action in Florida state court. The court generally has discretion to abstain based on (a) an existing state judicial proceeding (b) implicating important state interests and (c) furnishing a meaningful opportunity to raise constitutional challenges.

The court will not abstain. Stroman cannot challenge the California regulations in Florida. The

Florida action does not encompass even all of the issues raised against Florida in this case. When Florida filed suit against Stroman, it had known for several weeks that Stroman was considering filing this action since Stroman had sent it a draft complaint. Its present complaint that this action-filed the day after the suit in Florida was filed-interferes with the "ongoing" Florida case rings hollows.

7. *Other.*

The defendants have also moved to dismiss on the grounds of comity and federalism. Comity is respect for parallel institutions usually in international law. This court has as much responsibility to use its power when it is proper as it does not to use it when it is improper. In this case the plaintiff is attempting to use the economic union that was an *intended* consequence of the Constitutional Union. Whatever the constitutionally required national deference to state governments may be, it does not include accommodation of multi-state power grabs or protectionist use of regulatory schemes. Federalism is a critical component of the constitutional plan, but it implies something very different from states' being excused from their responsibilities under the Constitution. Federalism militates in favor of this court hearing a claim that two states are burdening interstate commerce.

8. *Conclusion.*

The judicial power of the United States extends to these officers. The defendant officers have sufficient contacts with south Texas. Venue is proper here, and this forum is convenient. This court's hearing the case does not transgress comity and federalism. Stroman has sufficiently stated a claim. The court declines to abstain. It will hear the case.

Order

The defendants' motions to dismiss are denied. The case is not stayed pending the interlocutory appeal.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed JAN 22, 1999]

Case No. H-98-0283

STROMAN

v.

ANTT and FARRELL

JOINT STIPULATED FACTS

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P.C., of Conroe, Texas as the escrow agent, but the seller may use a different agent if he chooses or if the Rice firm is unable to handle title insurance and title work relating to the closing.

96. If the buyer wants title insurance, the escrow and the rest of the file are sent to a settlement agent that can provide what is required. The Rice firm or other closing agent then takes care of the remaining matters necessary for closing.

97. Stroman does not act as an escrow agent in timeshare resale transactions as a regular course of business.

98. Sales commissions can be negotiated and are sometimes waived to facilitate sales.

99. Stroman has not sent any employees or agents physically to Florida or California to solicit any specific individual timeshare sale or to assist in any specific individual timeshare sale or settlement.

100. CONFIDENTIAL: [REDACTED]

101. CONFIDENTIAL: [REDACTED]

102. CONFIDENTIAL: Stroman's database includes over [REDACTED] Texans that own Florida time-shares. Over [REDACTED] of these Texans have paid registrations fees to Stroman.

103. CONFIDENTIAL: Approximately [REDACTED] Texans who own California time-shares have paid registration fees to Stroman, including [REDACTED] with residences in the federal Southern Judicial District of Texas.

104. CONFIDENTIAL: Approximately [REDACTED] residents of the Southern District of Texas who own Florida time-shares have paid Stroman registration fees.

APPENDIX F

[LOGO]
STATE OF CALIFORNIA
BUSINESS TRANSPORTATION AND
HOUSING AGENCY
PETE WILSON, *Governor*

DEPARTMENT OF REAL ESTATE
2201 Broadway, P.O. Box 187000
Sacramento, CA 95818-7000
(916) 227-0789

December 3, 1997

ROBERT L. RICE, IV
Rice, Rice & Rice, P. C.
3241 West Davis, Suite 120
Conroe, TX 77304

Dear Mr. Rice:

RE: H-7493 SF, ERA Stroman Realty, Inc.

This is a follow-up to a letter dated November 6, 1997, from Real Estate Commissioner Jim Antt, Jr. In that letter, Commissioner Jim Antt stated that we would respond to your correspondence concerning the Order to Desist and Refrain issued in the above referenced matter. The Department of Real Estate does not agree that the Order was issued in error. Further, we do not intend to voluntarily remove the Order as you have requested.

Your previous correspondence refers to *Resort Timeshare Resales In. v. DRE* and your belief that the holding of the case does not apply to your clients because of the different manner in which your clients operate and because the case was limited to intra-state activity (your emphasis). We agree with your first contention that your client's business is dis-

tinguishable from that described in the case. However, as will be demonstrated later, we reach a different conclusion as to what consequences flow from that distinction. You should note that the second page of the *Resort Timeshare Resales* opinion specifically describes RTR's operations as "interstate and international with approximately 20 percent of its listed timeshare resale units in California". Therefore, interstate activity is not exempt. In any event, as you are no doubt aware, Rule 977 of the California Rules of Court provides that opinions that are not certified for publication shall not be cited or relied on by a court or a party in any action or proceeding except for instances not relevant in this discussion. The *Resort Timeshare Resales* opinion is not certified for publication and therefore may not be cited or relied upon.

Our review of the materials provided by your client to California residents leads us to the conclusion that your client is performing acts for which a California real estate broker license is required.

In a letter dated September 17, 1996, from Charles Vincent Young to Dean E. Riccioni, your client stated the following, among other things:

> "RELIABILITY: ERA STROMN has been active in the resort property resale market and under original management since 1979. We specialize in timeshares, camping memberships, resort lots, homes, condos and fractional interests. We are members of the following real estate related organizations:
>
> National Association of REALTORS
> Texas Association of REALTORS
> Houston Association of REALTORS
> Montgomery County Association of REALTORS

All of our company's Sales Associates are licensed Real Estate Agents or Brokers, thereby providing to the consumer the protective scrutiny such a license demands. In fact, all of our Sales Associates are REALTORS.

PROPERTY EXPOSURE: To meet the demands of our clients, ERA STROMAN has a comprehensive marketing program which entails advertising extensively on a national as well as international basis. This program, along with other programs, generates responses for both buyers and sellers.

Resort Property Auctions - Since 1985, our auction promotions have been successful for our clients; currently, we sponsor at least four (4) auctions annually.

The "Information Super Highway" - We also advertise on the Internet as an exclusive TIMESHARE/CAMP MEMBERSHIP RESALE BROKER. An "on-line" catalog containing resort descriptions of individually owned CTLS registered properties is available to the estimated 45 million users on the Internet!

Immediately upon input of the data, our staff of Sales Associates actively begin the search for a "prospect match". The ERA Real Estate Network includes more than 30,000 Sales Associates located in over 2,500 offices throughout all 50 states, Mexico, Europe, South Africa and the Asian Pacific Rim. Each office is independently owned and operated.

CLOSING EXPERTISE: When a buyer is matched with a property, an ERA Sales Associate will

arrange for transfer of title and will follow through until final funding is made to the seller."

In a letter dated October 21, 1996 from Angela G. Parker to Dean E. Riccioni, your client stated the following, among other things:

"The information about your property is available to thousands of potential buyers through our extensive marketing efforts and specialized computer system. Last year ERA STROMAN generated over 4.5 million pieces of mail targeted to individuals with an interest in vacation resort property and memberships. Our affiliation with Electronic Realty Associates L.P., (ERA Real Estate) in over 2,500 offices and 30,000 plus agents, worldwide, will give your property even more exposure.

We will immediately submit to you all firm offers but not casual inquiries from unqualified persons."

In yet another letter dated October 11, 1996, from Charles Vincent Young to Dean E. Riccioni, your client stated the following, among other things:

"You will be advised promptly of all firm offers for your property but not casual inquiries from unqualified persons. Once you have accepted an offer and escrow is opened, it normally takes between thirty to ninety days before funding. We will advertise to all cooperating brokers that you will pay a total commission of 10% of the selling price or $750, whichever is greater, at funding.

We or one of our cooperating brokers will contact you primarily by telephone with all qualified prospects for your property."

Letters containing provisions identical to those quoted above were sent to other California residents, including those listed in the Order to Desist and Refrain. We have no reason to believe that your client will fail to perform the acts described in the letters. The acts described above are those which are typically performed by a real estate broker acting as an agent in the sale of real property. See *Hasekian v. Krotz* (1968) 268 C.A. 2d 311; *Montoya v. McLeod* (1985) 176 C.A. 3d 57 and *Preach v. Monter Rainbow* (1993) 12 C.A. 4th 1441.

Under Business and Professions Code Section 10130, "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department." In our opinion, your client is acting in the capacity of or advertising or assuming to act as a real estate broker in California without having the requisite license.

It is also clear that your client is collecting an advance fee within the meaning of Business and Professions Code Section 10026. Therefore, in addition to obtaining a California real estate broker license, your client will need to comply with Sections 10085 and 10146 of the Business and Professions Code.

Your client's rights to a hearing on the Order to Desist and Refrain are set forth in Business and Professions Code Section 10086.

We hope this information will be of assistance to you.

Sincerely,

/s/ Larry A. Alamao
Attorney in Charge

Department of Real Estate
P. O. Box 187000
Sacramento, CA 95818-7000
(916) 227-0789

TO:

ERA STROMAN REALTY, INC.,
CHARLES YOUNG,
TRACY REISSIG,
and TED F. CLARK

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

[Filed SEP 3, 1997]

No. H-7493 SF

ORDER TO DESIST AND REFRAIN
(B&P Code Section 10086)

Upon the facts stated below, the Real Estate Commissioner of the State of California (hereafter the Commissioner) is of the opinion that you have solicited advanced fees from California residents without first having the agreements and materials used in such solicitation approved by the Department of Real Estate, State of California (hereafter the Department) in violation of Section 10085 of the Code, and Section 2970, Title 10, California Code of Regulations (hereafter the Regulations).

I

All further references herein to "you" include the parties identified above, and also include the officers, directors, employees and agents employed by or associated with said parties and who at all times

herein mentioned were engaged in the furtherance of the business or operations of said parties and were acting within the course and scope of their authority and employment.

II

Beginning on or before September 1, 1996, you solicited residents of California, and offered or agreed to assist in the sale of their timeshare real property for an advance fee of $489.00. including, but not limited to, the following:

OWNER	PROPERTY	DATE
Dean Riccioni	Riviera Oaks	9/10/96
Melba Manchester	Club Donatello	10/96
Richard Gulson	Club Donatello	3/14/97

III

On or about July 6, 1997, and continuing thereafter, in order to conduct the acts described in Paragraph II above, you solicited for prospective buyers and sellers of timeshares in the San Francisco Chronicle.

IV

You made use of materials in advertising and soliciting said advance fee agreement without first having submitted said materials to the Commissioner prior to use in violation of Section 10085 of the Code and Section 2970 of the Regulations.

NOW, THEREFORE, YOU ARE ORDERED TO DESIST AND REFRAIN from performing any of the acts alleged herein until you have complied with Section 10085 of the Code and Section 2970 of the Regulations.

DATED: 8/15/07

/s/ JIM ANTT, JR.
Jim Antt, Jr.
Real Estate Commissioner

cc: ERA STROMAN REALTY, INC.
14500 Highway 105 West
Conroe, Texas 77304

CHARLES YOUNG
14500 Highway 105 West
Conroe, Texas 77304

TRACY REISSIG
14500 Highway 105 West
Conroe, Texas 77304

TED F. CLARK
14500 Highway 105 West
Conroe, Texas 77304

Department of Real Estate
P. O. Box 187000
Sacramento, CA 95818-7000
(916) 739-3607

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

[Filed OCT 18, 1990]

NO. H-2632 SAC

ORDER TO DESIST & REFRAIN
(B&P Code Section 10086)

TO:

STROMAN REALTY, INC.,
TRACY REISSIG,
CHERYL K. VINSONHALER,
BILLY STEVENSON,
KATHLEEN SMITH

The Real Estate Commissioner of the State of California has investigated your activities within the State of California and based on the findings of that investigation, as set forth hereinbelow, has determined that you have engaged in acts requiring a California real estate broker license, as defined in Section 10131(a) and Section 10131.2 of the Business and Professions Code of the State of California (hereinafter Code) without first obtaining a real estate broker license from the Department of Real Estate (hereinafter Department) in violation of Section 10130 of the Code.

I

At all times herein mentioned, STROMAN REALTY, INC., its agents and employees were engaged in and

performing the acts referred to below within the State of California.

II

Beginning on or about September 1, 1989, you solicited residents of California and offered or agreed to assist in the sale and the negotiation of the sale of time-share real property owned by said residents for an advance fee ranging from $189.00 to $289.00. Said acts, as described in this paragraph, come within the meaning of the term real estate broker as defined in Sections 10131(a) and 10131.2 of the Code and include, but are not limited to, the following transaction:

DATE	OWNER	ADVANCE FEE
September 1989	Arnold Roth	$250.00
November 1989	Mark Stephan	$189.00
September 1990	Janice Waddell	$289.00

III

You made use of materials, in advertising and obtaining advance fee agreements without having submitted said materials to the Commissioner prior to use in violation of Section 10085 of the Code and Section 2970, Title 10, California Code of Regulations.

IV

At no time prior to performing the acts referred to hereinabove were you, or each of you, licensed as a real estate broker and you were therefore acting in violation of Section 10130 of the Code.

NOW, THEREFORE, YOU ARE ORDERED TO DESIST AND REFRAIN from performing any and all

acts within the State of California for which a real estate broker license is required until you have obtained such a license and from demanding, charging, receiving, collecting or contracting for an advance fee until you have complied with Sections 10085 and 10146 of the Code.

DATED: October 5, 1990

JAMES A. EDMONDS, JR.
Real Estate Commissioner
BY:_____/s/_____
ROBIN T. WILSON
Chief Legal Officer

[LOGO]
STATE OF CALIFORNIA
BUSINESS TRANSPORTATION AND
HOUSING AGENCY
PETE WILSON, *Governor*

DEPARTMENT OF REAL ESTATE
2201 Broadway, P. O. Box 187000
Sacramento, CA 95818-7000
(916) 227-0789

September 3, 1997

BEVERLY S. RABENBERG
Senior Attorney, Enforcement Division
Texas Real Estate Commission
P. O. Box 12188
Austin, TX 78711-2188

Dear Ms. Rabenberg:

California Real Estate Commissioner Jim Antt, Jr. has asked that we provide you with information regarding ERA Stroman Realty. As you are no doubt aware, Stroman purports to assist timeshare owners in selling their timeshare interests in exchange for a $489.00 fee paid in advance.

Recently, this Department issued an Order to Desist and Refrain addressed to Stroman and three individuals employed by Stroman. A copy of that Order is attached for your information. Since this is the latest in a number of Orders issued against Stroman, it is our intention to also notify the ERA franchise headquarters and the postal authorities. We are also exploring possible injunctive action.

If you have any questions or desire any additional information, please contact me.

Sincerely,
/s/ Larry A. Alamao
Attorney in Charge

[LOGO]
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION

Lawton Chiles
Governor

Richard T. Farrell
Secretary

May 14, 1997

Via Facsimile (713) 223-5821

Simone Scott, Senior Attorney
Attorney General of Texas
Consumer Protection Division
Suite 1550
1019 Congress Avenue
Houston, Texas 77002

Dear Ms. Scott:

I am requesting all complaints on file related to Florida timeshares and Florida residents regarding ERA Stroman's acceptance of advance fees for the sale of timeshare weeks. I am filing this request pursuant to the Texas Open Records Act, section 552.021, Texas Revised Civil Statutes,

If there is a cost involved, I will need time to arrange a purchase order to accompany this request. If there is a cost involved, please advise me of the amount that would be due.

If it is possible, I would appreciate these records being certified as being official records in the attorney general's office.

I appreciate your assistance in this matter.

Very truly yours,

_____/s/_____
Janis Sue Richardson
Assistant General Counsel

[LOGO]
Office of the Attorney General
State of Texas

Dan Morales
Attorney General

May 20, 1997

Ms. Janis Sue Richardson
Assistant General Counsel
FL Dept. of Business and Professional Reg.
Northwood Centre
1940 North Monroe Street
Tallahassee, FL 32399-1007

Re: Stroman Realty, Inc. and Wayne A. Stroman

Dear Ms. Richardson:

I received your open records request dated May 14, 1997 regarding the above-referenced matter. I have been informed by my immediate superior that because your agency is a law enforcement agency, an open records request is not necessary.

I have provided you with documents from our file which are considered public in nature. If this office can further assist you, please do not hesitate to call.

Sincerely,

/s/ Simone R. Scott
Simone R. Scott
Assistant Attorney General
Consumer Protection Division

[LOGO]

TEXAS REAL ESTATE COMMISSION

Mailing Address: P.O. Box 12188 AUSTIN, TEXAS 78711-2188

Phone: (512) 459-6544 Fax: (512) 465-3998

February 12, 1998

LARRY A ALAMAO
DEPARTMENT OF REAL ESTATE
2201 BROADWAY
PO BOX 187000
SACRAMENTO CA 95818-7000

Re: Our File Number 980167

Dear Mr. Alamao:

We have completed a review of your complaint, our investigator's report and all witness statements and exhibits and we are closing our file in the matter with an advisory to Stroman Realty, Inc/Wayne Arlyn Stroman-Designated Officer regarding the requirements of the Real Estate License Act and the Rules of the Texas Real Estate Commission as they pertain to the complaint.

It has been determined in other matters that a licensee's failure to comply with laws, other than the License Act or Rules, which pertain to their real estate related activities could be construed as negligence on the part of the licensee resulting in sanctions. It is noted that in this instance the licensee did comply with the Cease and Desist Order and take other legal action relative to it therefore no further action of the Real Estate Commission is required.

We appreciate your having brought this matter to our attention and giving us the opportunity to take appropriate action.

Sincerely,

/s/ Brian H. Clapp
Brian H. Clapp
Acting Director of Enforcement
(512) 465-3960

[LOGO]
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION

Lawton Chiles
Governor

Richard T. Farrell,
Secretary

January 9, 1996

ERA STROMAN
14500 Highway 105 West
Conroe, Texas 77304

Dear Sir:

One regulatory program within the Division of Florida Land Sales, Condominium, and Mobile Homes is the Bureau of Timeshare. The Bureau is responsible for regulating the creation, sale, and operation of timeshare plans within the State of Florida, pursuant to Chapter 721, Florida Statutes; the Florida Vacation Plan and Timesharing Act

Chapter 721 was enacted to protect consumers and to safeguard Florida's tourism industry. It is the duty and responsibility of the Bureau of Timeshare to assure that all timeshare related business conducted in the state of Florida is in statutory compliance.

Section 721.20(4), Florida Statutes, states that notwithstanding the provisions of section 475.452, Florida statutes, it is unlawful for any broker, salesperson, or broker salesperson to collect any advance fee for the listing of any timeshare estate or timeshare license.

The Bureau has reviewed your brochure titled, "From Start to Finish - Buying and Selling Timeshares, Camp Memberships and Resort Properties" and other listing documents. The collection of a fee to

"register" a Florida timeshare interest in the CTLS Computer Matching System, appears to be in violation of section 721.20(4), Florida Statutes.

Additionally, section 721.065, Florida Statutes, states that an owner who acquires a timeshare period for his own use and occupancy and later offers it for resale, or any agent of such person, must utilize a resale purchase agreement. The section further states that any resale purchase agreement utilized must contain all of the following: [a] The name and address of the timeshare plan and of the managing entity of the timeshare plan. [b] The following statements in conspicuous type: THE CURRENT YEAR'S ASSESSMENT FOR COMMON EXPENSES ALLOCABLE TO THE TIMESHARE PERIOD YOU ARE PURCHASING IS $_____. THIS ASSESSMENT, WHICH MAY BE INCREASED FROM TIME TO TIME BY THE MANAGING ENTITY OF THE TIMESHARE PLAN, IS PAYABLE IN FULL EACH YEAR ON OR BEFORE _____. THIS ASSESSMENT (INCLUDES/DOES NOT INCLUDE) YEARLY AD VALOREM REAL ESTATE TAXES, WHICH (ARE/ARE NOT) BILLED AND COLLECTED SEPARATELY. (if ad valorem real property taxes are not included in the current year's assessment for common expenses, the following statement must be included: A DELINQUENCY IN THE AMOUNT OF $_____ FOR UNPAID COMMON EXPENSES OR AD VALOREM TAXES CURRENTLY EXISTS WITH RESPECT TO THE TIMESHARE PERIOD YOU ARE PURCHASING. TOGETHER WITH A PER DIEM CHARGE OF $_____ (FOR INTEREST AND LATE CHARGES). FOR THE PURPOSES OF AD VALOREM ASSESSMENT, TAXATION, AND SPECIAL ASSESSMENTS, THE MANAGING ENTITY WILL BE

CONSIDERED THE TAXPAYER AS YOUR AGENT PURSUANT TO SECTION 192.037, FLORIDA STATUTES. EACH OWNER IS PERSONALLY LIABLE FOR THE PAYMENT OF HIS ASSESSMENTS FOR COMMON EXPENSES, AND FAILURE TO TIMELY PAY THESE ASSESSMENTS MAY RESULT IN RESTRICTION OR LOSS OF YOUR USE AND/OR OWNERSHIP RIGHTS. THERE ARE MANY IMPORTANT DOCUMENTS RELATING TO THE TIMESHARE PLAN WHICH YOU SHOULD REVIEW PRIOR TO PURCHASING A TIMESHARE PERIOD INCLUDING THE DECLARATION OF CONDOMINIUM OR COVENANTS AND RESTRICTIONS: THE ASSOCIATION ARTICLES AND BYLAWS; THE CURRENT YEAR'S OPERATING AND RESERVE BUDGETS; AND ANY RULES AND REGULATIONS AFFECTING THE USE OF TIMESHARE PLAN ACCOMMODATIONS AND FACILITIES.

[c] The following statement in conspicuous type located immediately prior to the space in the contract reserved for the signature of the purchaser:

YOU MAY CANCEL THIS CONTRACT WITHOUT ANY PENALTY OR OBLIGATION WITHIN 10 DAYS AFTER THE DATE YOU SIGN THIS CONTRACT. IF YOU DECIDE TO CANCEL THIS CONTRACT, YOU MUST NOTIFY THE SELLER IN WRITING OF YOUR INTENT TO CANCEL. YOUR NOTICE OF CANCELLATION SHALL BE EFFECTIVE UPON THE DATE SENT AND SHALL BE SENT TO THE SELLER AT _____(address)___. ANY ATTEMPT TO OBTAIN A WAIVER OF YOUR CANCELLATION RIGHT IS VOID AND OF NO EFFECT. WHILE YOU MAY EXECUTE ALL CLOSING DOCUMENTS IN ADVANCE, THE

CLOSING, AS EVIDENCED BY DELIVERY OF THE DEED OR OTHER DOCUMENT, BEFORE EXPIRATION OF YOUR 10-DAY CANCELLATION PERIOD, IS PROHIBITED.

If a resale purchase agreement is not in compliance with section 721.065, Florida Statutes, the contract is voidable at the option of the purchaser for a period of 1 year after the date of closing.

Pursuant to section 721.26(3), Florida Statutes, which states that for the purpose of any investigation, the director of the Division or any officer or employee designated by the director, may subpoena witnesses and compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation, including the identity, existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence.

On or before January 30, 1997, please provide this office with copies of all executed CTLS Registration Agreements and executed resale purchase agreements related to Florida timeshare interests.

Your cooperation in addressing this matter is both important and appreciated.

Sincerely,

/s/ Laurie Dennis
Laurie Dennis, Specialist
Enforcement Section
Bureau of Timeshare

[LOGO]

DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION

Lawton Chiles
Governor

Richard T. Farrell
Secretory

November 5, 1997

Robert L. Rice
3421 West Davis, Suite 120
Conroe, Texas 77304

Alan N. Schlaifer
Suite 616
8200 Wisconsin Avenue
Bethesda, Maryland 20814-3114

RE: Stroman Realty, Inc. Settlement Offer dated September 11, 1997

Dear Mr. Rice and Mr. Schlaifer:

We have carefully reviewed and considered your offer to settle the issues raised by the Secretary of State (State) and the Divisions of Real Estate (Real Estate) and Land Sales, Condominiums, and Mobile Homes (Timeshare) in the Department of Business and Professional Regulation. We understand that you have already stopped all direct mailings into the state of Florida, have stopped collecting money from Florida residents who list a timeshare interest with your company prior to the resale of the timeshare, and are including the statutorily required disclosures in contracts for the sale of Florida timeshare properties. We appreciate your willingness to settle these issues and to comply with Florida law from September 11, 1997 forward.

We accept Stroman Realty, Inc.'s (Stroman) assertions and actions already undertaken as mitigating circumstances. We base our counter-proposal upon Stroman Realty's good faith action to seek a settlement of all outstanding issues.

Timeshare

The Bureau of Timeshare (Timeshare) interprets section 721.20, Florida Statutes, as applying to all listings of Florida timeshare property regardless of the residence of the seller. Therefore, Timeshare will require Stroman to cease Stroman's collection of advance fees for the listing of Florida timeshare property regardless of the state of residence of the seller in addition to its not collecting an advance fee from Florida residents for a timeshare resale.

Timeshare has received complaints from both Florida residents and owners of Florida timeshare property. The bureau proposes to assess a penalty of $60,000 for the violations of section 721.20(4), Florida Statutes, that are presently known. In addition to the penalty, Timeshare requests that Stroman refund the advance fee paid by the listed complainants, if any such complainants have not already received a refund, and provide evidence of the refunding of the advance fee or evidence that the timeshare interest has been sold through Stroman's efforts on behalf of the owner.

Osama M. Alqaddoumi and Samar Y. Alqaddoumi
3300 N.E. 191st Street, Apt 1213
Miami, Florida 33180-2446

Jerome L. and Carmen M. Blake
10870 S.E. 25th Avenue
Trenton, Florida 32693

L.R. Kearsley-Brown and Dorothea Kearsley-Brown
9613 Southeast 173rd Place
Summerfield, Florida 34491

Albert and Sophie Evans
2296 Alba Way
Deerfield Beach, Florida 33442

Mark F. Heidel
410 South Division Street
Mount Union, Pennsylvania 17066

John Holland
216 Holly Street
Pensacola, Florida 32514-3163

Marcia Nickols
1736 North Albemarle Street
McLean, Virginia 22101-4221-36

M. Luse
803 50th Avenue, Circle Drive C
Bradenton, Florida 34203

John S. Pletcher
P.O. Box 1076
Anna Maria, Florida 34216

Reverend and Mrs. William C. Senn
3777 Golden Acres Circle
Crestview, Florida 32539

Kenneth A. Spell and Michele A. Spell
4393 N.W. 12th Court
Ocala, Florida 34475

Mr. & Mrs. Chris Teti
130 Pleasant Ridge Place
Orlando, Florida 32835

Daryl A. Weishaar
5160 Minto Road
Boynton Beach, Florida 33437-1204

To summarize, Timeshare requests that Stroman agree to:

1. Cease collecting advance fees from Florida residents for the listing of their timeshare property;

2. Cease collecting advance fees from non-residents of Florida for the listing of their Florida timeshare property;

3. Pay a penalty of $60,000;

4. Refund advance fees to all thirteen (13) complainants presently on file and any Florida resident and/or owner of Florida timeshare property who file a complaint with the division within six months following the execution of a consent order. This inquires Stroman to provide evidence of the refund within 30 days of the end of the six month period. No refund is required for those timeshare properties sold due to Stroman's efforts.

Real Estate

Real Estate is not seeking a civil penalty or fine as a condition of settlement. Real Estate is seeking compliance with chapter 475, Florida Statutes. Real Estate requests that Stroman take the following actions:

1. The "ERA Stroman" entity (corporation, partnership, etc.) register as a real estate brokerage entity under chapter 475, part I, Florida Statutes. If the entity is conducting business under a trade name (i.e., a name other than the entity's actual name), then the trade name is entered into the division's records as part of the entity's registration.

2. For any real property interests, including timeshares, which are located in Florida, regardless of where the sellers and buyers are located, all

individuals conected with the registered brokerage entity, who communicate with the sellers and buyers must be licensed as brokers or salespersons under chapter 475, part I, Florida Statutes. The only exception would be the exemption (which presently exists) concerning individuals who provide factual information from printed materials. Specific advice should be obtained from either Jim Kimbler, Chief of the Bureau of Enforcement or Steve Fieldman, Chief Attorney, in the Division of Real Estate before reliance is placed on this exception.

3. All individuals connected with the registered brokerage entity, who perform any activity that is described as brokering in chapter 475, part I, Florida Statutes, while the individual is physically present in Florida, must be licensed as a broker or salesperson, regardless of where the property is located and regardless of where the sellers and buyers are located.

State

The Florida Department of State will not, under these facts, seek qualification under section 607.1501, Florida Statutes.

If Stroman agrees to the settlement conditions outlined, the state agencies will drop all litigation contemplated against Stroman for alleged violations of Florida law prior to and up to the execution of a signed consent order, which will memorialize this agreement. If you wish to confer with the representatives of the state regarding this counter-offer, a conference call can be arranged by contacting Sue Richardson at (850) 487-1137.

Very truly yours,

_____/s/_____
Janis Sue Richardson,
Assistant General Counsel
Division of Florida Land Sales,
Condominiums, and Mobile Homes
(850) 487-1137
and
Steven Fieldman, Chief Attorney
Division of Real Estate
(407) 317-7259
Department of Business and Professional
Regulation

_____/s/_____
Gerard T. York,
Assistant General Counsel
Florida Department of State
LL-10, The Capitol
Tallahassee, Florida 32399-0250
(850) 414-5536

cc: Robert H. Ellzey, Jr.
Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes

Henry Solares
Director
Division of Real Estate

[LOGO]
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION

Lawton Chiles
Governor

Richard T. Farrell
Secretary

March 21, 1997

VIA FIRST CLASS U.S. MAIL

Mr. Robert L. Rice, Attorney at Law
14500 Highway 105 West, Suite 100
Conroe, Texas 77304

RE: File No. 960830TV31707 ERA Stroman

Dear Mr. Rice:

Thank you for your letter dated February 27 1997, received in the Bureau on March 1, 1997. The information and insight you provided is appreciated.

In implementing the provisions of Chapter 721, Florida Statutes, the Division proceeds upon the assumption that the laws are constitutionally valid and attempts to apply those laws in a manner consistent with their plain meaning and spirit.

Your comments with respect to the efforts of ARELLO and the free transfer of property are at least partially in-a propos. The Florida restriction against advance fee listing of timeshare interests does not unduly impede the free transfer of property; first, it is merely a reasonable restriction on the manner in which the property can properly be listed; second, it is addressed to an unscrupulous practice in which there really is no transfer of property, only a listing fee paid by the naive and unwary.

Since your client operates in many states, you cannot be unaware of the unscrupulous practices associated with advance fee listing of timeshare interests that prompted the Florida prohibition. These practices are not limited to this State and can only harm the reputation of the timeshare industry, in turn leading to increasing numbers of consumer complaints in all States and more attempts at legislative remedies. If your client is in fact vigorously and successfully effectuating real transfers of property between timeshare sellers and buyers then there can be no great harm or business impediment to making proper disclosure in a resale contract or postponing payment for the listing service until after the transfer of property takes place.

In conclusion, the Bureau requests copies of all executed CTLS Registration Agreements and executed resale purchase agreements related to Florida timeshare interests. Please provide this information by April 11, 1997. Unless and until this case is forwarded to our Legal department for prosecution, please continue to communicate with Richard Thrawl in the Fort Lauderdale office should you have any questions regarding this case.

Sincerely,
/s/ Laura L. Glenn
Laura L. Glenn, Esq.
Chief, Bureau of Timeshare

cc: Elizabeth Baker
Richard Thrawl
Robin Suarez, Esq.

Questions About Doing Business on the 'Net

As a Consumer, What Should I Know About Doing Real Estate Business on the Net?

Consumers should confirm that any business conducting licensed activities is actually licensed by the state(s) in which such activity is carried on. Checking License status.

I Want to Advertise or Do Real Estate Business on the Net, What Should I Know About California Law?

- California Businesses

You should be aware of what constitutes licensed activity (See Business and Professions (B&P) Code Sections 10130 et seq.) and what may require DRE advance fee agreement approval (See B&P Code Section 10085 et seq.).

Unlicensed activites can result in administrative and criminal penalties.

Licensees who advertise on the Net are required by law (B&P Sections 10235.5 and 10140.6) to indicate their licensed status.

False or misleading advertising can result in administrative, civil and/or criminal penalties.

- Non-California Businesses

These guidelines have been prepared by the California Department of Real Estate to assist real estate brokers and businesses that are not licensed in California who are considering advertising real estate services on the Internet.

If you are not properly licensed in California, you may not solicit California residents. To do so would

be considered conducting activity for which a real estate license is required. Because the Internet can be read by anyone in any location, advertising your services on the Internet would be considered soliciting a California resident when read by a resident of this state.

If you conduct activity which requires a California real estate license, but you are not a California licensee, you could be subject to administrative sanction such as a Desist and Refrain Order.

Section 10131 of the California Business & Professions Code sets forth a general description of acts which require a real estate license:

a. Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

b. Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from a business opportunity.

Department of Business and Professional Regulation

Division of Florida Land Sales, Condominiums and Mobile Homes

BPR Home Page BPR Organizational Information Florida Communities Network

Welcome to the Division of Florida Land Sales, Condominiums and Mobile Homes. For information about our Division, please choose from the following:

Directors Office	Financial Analyst Sectio	Arbitration Section
Health Care – Service Pool	Yacht and Ship Brokers	Bureau of Condominium
Bureau of Land Sales Registratio	Bureau of Mobile Homes	Bureau of Timeshare

Links - Electronic bridges to help you visit home pages of other agencies of interest to consumers.

Links Disclaimer

The Department of Business and Professional Regulation (BPR) uses links to other web sites in an effort to assist users in locating information on topics that might be of interest to them. Whenever you click on any of the links shown below on this page, you are leaving BPR's home page and entering an external site. BPR cannot attest to the accuracy of information provided by linked sites. Linking to a web site does not constitute an endorsement by BPR or any of its employees of the sponsers of the site or the products/information presented on the site.

How to Protect Yourself:

TIMESHARE SALES & RESALES

Source: The Florida Attorney General's Office

Vacation timeshares give you the right to use a vacation home for a limited, pre-planned period. Timeshare scams occur both on the front-end, the time of the original purchase, and at the back-end, when you try to resell the timeshare. Victims of timeshare sales companies are contacted either over the phone or are mailed a postcard asking the victim to call a toll-free phone number. Before your decide to either purchase or resell a timeshare, consider the following:

TIPS FOR CONSUMERS

Be Wary Of The Hard Sales Pitch

When it comes to purchasing a new timeshare, the salesman may try to give you the impression that the papers have to be signed that same day. Remember that you always have the right to leave the sales office, and come back later. Read your contract to determine what cancellation rights you have after you have signed the papers. Before buying a timeshare, you should consider whether you will want to return to the same vacation spot each year. Remember that once you buy it, you may not be able to sell it due to a depressed resale market.

Be Wary Of Too-Good-To-Be-True Claims When It Comes To Resales

The company's salespeople are likely to claim that the market in the area where your resort is located is "hot" and that they are being overwhelmed with buyer requests for your resort. In some cases, the salespeople may even tell you that they have a buyer

waiting in the wings who wants to buy your timeshare. Be skeptical of these types of claims. Remember the timeshare market is not "hot" and it is unlikely that there is a buyer ready and willing to buy your timeshare.

Question Why You Have To Pay The Fee Up Front

Most resale companies require you to pay a $300-500 advance listing fee, before the sale of your timeshare can take place. In a typical real estate transaction the fee is paid from the proceeds of the sale, at the time of the sale. You may want to opt for a company which will wait for its fee until the sale goes through. You should also find out if the salespeople are licensed real estate brokers, and, contact the licensing agency in the state where the company is located to determine if their license is valid, and whether there are any complaints lodged against the broker.

Consider Other Options When It Comes To Resale

You may want to try selling your timeshare "by owner", by placing an advertisement in a newsletter or magazine read by potential timeshare buyers. Or you may want to list your timeshare with a licensed real estate broker in the area where your resort is located. As an alternative, you could contract with a company which allows you to exchange your timeshare for a unit in a different area.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION BUREAU OF TIMESHARE - FORT LAUDERDALE

ENFORCEMENT REPORT

DATE PREPARED 1/26/98	PREPARED BY bcl	DATE OPENED 08/30/96	CASE #: 960830tv31707 PROJECT #: Not Applicable DEVELOPER # Not Applicable MANAGING /E#: Not Applicable
COMPLAINANT: Division of FLSC&MH: 1940 North Monroe Street Tallahassee, Florida 32399-1032 904-487-2753			RESPONDENT: Stroman Realty Inc., d/b/a: ERA Stroman 14500 Highway 105 West Conroe, Texas 77304 409-588-4444

TIMESHARE PLAN:
Not Applicable

RESPONDENT CONTACT:
Robert Rice, Attorney at Law

NUMBER UNITS FILED:
Not Applicable

MANAGING ENTITY:
Not Applicable

PLAN TYPE:
Not Applicable

DEVELOPER:
Not Applicable

MANAGEMENT COMPANY:
Not Applicable

REGISTERED AGENT:
Not Applicable

COMMUNITY ASSOCIATION MANAGER:
Not Applicable

CPA:
Not Applicable

MANAGING ENTITY ATTORNEY:
Not Applicable

STATUTORY VIOLATIONS / ALLEGATIONS

RESPONDENT collected and is collecting advance fees for the listing of timeshare estates, in violation of section 721.20(4), Florida Statutes (1995).

SPECIALIST____/s/_____ DATE: 1/26/98

SUPERVISOR_____/s/___ DATE:1/27/98

BUREAU CHIEF _____ DATE:_____

On April 17, 1997, the Bureau sent a letter to Mr. David Porter, ERA Stroman informing him that the case was closed based upon resolving the matter with Mr. Heidel. (Exhibit D8)

On or about the last week of April, this office received an invitation to sell, CTLS profile sheet, and a sale commission agreement entered into by Marcia Nickols with ERA-Stroman in April of 1996. These items reflect a charge of $489.00 to Ms. Nickols American Express card. This item is included as evidence. (Exhibit E)

On May 5, 1997, Sue Richardson forwarded to this office telephone logs reflecting inquiries and complaints concerning Respondent from the years 1994 and 1995. (Exhibit F)

On May 8, 1997, this office received from Sue Richardson via Richard Thrawl, Ft. Lauderdale office, a notice of a 'Resale Option Program' being offered to developers that in effect lists 'New' buyers of timeshare intervals in the ERA-Stroman CTLS database for a fee of $60.00. The notice also states that current owners may be listed for the same fee. (Exhibit G)

On May 5, 1997, this office received a copy of a letter from Sue Richardson to Mr. Gerald York, Department of State, Office of the General Counsel, State of Florida, in which Ms. Richardson outlines interactions and conversations which occurred at the ARDA convention in late April of this year. The letter notes that all state regulators in attendance at the conference felt that once a company entered their state via the Internet, the mails, or through the telephone, and made direct contact with the customer,

that company or individual was subject to state law arid regulation. (Exhibit H)

On May 21, 1997, this office received a facsimile transmission of a letter from Robert Rice, Attorney for ERA-Stroman, in which Mr. Rice compares a list of persons who have contacted our office regarding ERAStroman, with client files from the offices of ERA-Stroman. (Exhibit I)

On May 28, 1997, this office received a response from Simone Scott, Assistant Attorney General, Consumer Protection Division, State of Texas, to a request for all complaints on file regarding Subject, requested in a May 14, 1997 letter from Sue Richardson. This response contains eleven (11) Texas investigative files on Florida resident complainants who paid an advance fee. (Exhibit J)

On May 30, 1997, this office received a Legislative Contact Form from the office of Senator Ann Cowin, regarding an advance fee paid to ERA-Stroman by Ms. Kearsley-Brown for the listing of her Grand Shores West timeshare interval for re-sale. The office of Senator Ann Cowin was contacted and it was learned that Ms. Kearsley-Brown had all her documentation which was mailed to her Florida address, and would forward it to this office. (Exhibit K)

On May 30, 1997, telephone interview of Ms. Judy Smith, Supervisor, Complaint Section, Florida Real Estate Commission. Ms. Smith related that they have some case files on Subject and that she will have them copied and forwarded to this office. (Exhibit L)

June 3, 1997, telephone interview of Ms. Pat Stock, Enforcement, Minnesota Department of Commerce and Licensing. Ms, Stock related they have no files on

record, but believes that ERA-Stroman was told they mist be licensed in Minnesota to operate in Minnesota, and ERA-Stroman holds no such license. (Exhibit M)

June 6, 1997, telephone interview of Mr. Steve Haas, Deputy Commissioner, Real Estate Agency, Oregon. Mr. Haas' office became aware that ERA-Stroman was attempting to do business in Oregon. At that time, with the knowledge of ERA-Stroman attempting to contact consumers in Oregon a Cease and Desist Order was issued to them, and to date has no record of ERA-Stroman doing business in Oregon. (Exhibit N)

During the first week of June, 1997, The list of Florida Consumers who paid an advance listing fee to ERA-Stroman was extracted from Exhibit J, and contact was attempted for each name listed. Of the names listed, Five (5) were found to have occurred prior to 1995, Four (4) were initiated in 1995, and Two (2) were entered into in 1996. The majority, upon notifying Texas of their concerns, received refunds of fees paid. One Florida resident on the list, Mr. John Pletcher stated that he did not receive a refund, nor has a sale been effectuated. Mr. Pletcher entered into the agreement and paid the fee in January, 1995. Mr. Pletcher has no records on hand and has written this episode off to experience. Another Florida resident, Mr. Kamal Yunis is searching for his records concerning his daughter's payment of the advance fee, and will forward them if found. (Exhibit O)

On June 6, 1997, this office received a facsimile transmission of the paperwork in Mr. and Mrs. Kearsley-Brown's possession regarding their payment of an advance fee for the listing of their time-

share interval for re-sale by ERA-Stroman. Included with this facsimile is: the initial contact by ERA-Stroman to Mr. Kearsley-Brown via the US Mail to their Florida address regarding their timeshare interval at Grand Shores West, a Florida Timeshare located in Redington Beach, Florida; a sales slip noting the charge of the $489.00 registration fee charged to Ms. Kearsley-Brown's charge card; a signed, dated and approved "Computerized Property Profile for CTLS Buyer/Renter Matching" registration form; confirmation letter from Mr. Steve Scott of ERA-Stroman; and ERA-Stroman promotional literature. A hard copy will be following via the mails. (Exhibit P)

From May 20th to June 9th, 1997, this office has perused the Internet for information regarding ERA-Stroman and brought up the ERA-Stroman home page at http://www.stroman.com for their "Timeshare and Resort Information Network". This page lists 11 (eleven) other pages users can access for information ranging from 'What is Timeshare?'; 'Information Request'; to 'Selling a Timeshare'; and 'Resort Catalog'. The Resort Catalog lists the country by regions, including a listing for Florida alone. Upon choosing Florida, it will then list areas of Florida the user is interested in. Upon entering into a specific area of Florida, a list of Timeshares for that area are listed, many timeshares are underlined, and it is those that are underlined that users may 'click' on and bring up information on that particular timeshare. A printout of several of the "Text" screens for these pages (Florida), will note the server and identify it as one used by ERA-Stroman. A view of the "Location" screen will show when the last time these pages were changed. The Text page can be printed, the Location page is a view-only page for information. Included is

a printout of the pages, and a memo noting last date of change for each page listed on the home page. (Exhibit Q)

ERA-Stroman video, "Experience, Size, Systems" is included in file. (Exhibit R)

June 11, 1997, the Florida Division of Corporations shows no records for Stroman Realty Inc. (Exhibit S)

June 13, 1997, Memorandum, This office received a reply from Lynda Burda, Complaint Analyst with the Division of Real Estate, to a request for all records of complaints on file in reference to Stroman Realty Inc., made on May 30th, 1997. This reply consists of a print-out of the confidential DPR Consolidated Complaint Management System, CM10 screen which lists closed cases referencing Subject. (Exhibit T)

America, of which the state of Florida is one. There are 10 areas of Florida a user can access, with each area listing the timeshares in that area. The lists shows certain resorts are underlined. These underlined resorts can be accessed by the Internet user, meaning these resorts have individually owned intervals registered for sale. Resorts the user cannot access, do not have an interval registered for sale. The Daytona, Smyrna Beach, St. Augustine, and Ormond area page lists 45 individual timeshare resorts, of these, 35 resorts are underlined. Contained within the 10 area listings are a total of 325 resorts listed, with 245 resorts underlined. (Exhibits J, Q, and V)

3. The state of Texas, Office of the Attorney General has forwarded case files on 11 Florida residents who filed complaints with that office, who entered into listing contracts with ERA Stroman, including the payment of the $489.00 listing fee for

the resale of Florida timeshare intervals. This office has obtained information from 4 Florida residents who entered into listing contracts with ERA Stroman, including the payment of the $489.00 listing fee for the resale of Florida timeshare intervals. Telephone logs kept by the department show a minimum of 9 contacts for complaint or inquiry. (Exhibit J, B, C, P, and Q)

Conclusion:

The evidence collected by this investigator appears to support the allegation that Stroman Realty Inc., dba ERA Stroman is a "Regulated Party" as defined in section 721.05(27), Florida Statutes(1995) by acting as the real estate broker and agent of timeshare interval owners in the state of Florida for the purpose of resale of timeshare intervals.

ISSUE II.

Allegation: It is alleged that Stroman Realty Inc., dba ERA Stroman is collecting advance listing fees for the resale of timeshare intervals in possible violation of section 721.20(4), Florida Statutes (1995).

Facts:

1. The state of Texas, Office of the Attorney General has forwarded case files on 11 Florida residents who filed complaints with that office, who entered into listing contracts with ERA Stroman, including the payment of the $489.00 listing fee for the resale of Florida timeshare intervals. This office has obtained information from 4 Florida residents who entered into listing contracts with ERA Stroman, including the payment of the $489.00 listing fee for the resale of Florida timeshare intervals. (Exhibit J, B, C, D, and P)

Conclusion:

The evidence collected by this investigator appears to support the allegation that Stroman Realty Inc. dba ERA Stroman, may have collected advance listing fees from Florida residents for the resale of Florida timeshare intervals in violation of section 721.20(4), Florida Statutes (1995).

Relief and Remedy

Under the authority granted to the Division pursuant §721.26(5)(3)(e)1, Florida Statutes (1995), and the guidelines set forth in proposed rules 61B-41.002(3), and 61B- 41.003, it is recommended that with a

* * *